

No. 75-1495

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**In the Supreme Court of the United States**

OCTOBER TERM, 1975

Supreme Court, U. S.

FILED

APR 15 1976

THOMAS A. KLEPPE, SECRETARY OF THE INTERIOR,  
ET AL., APPELLANTS

MICHAEL RODAK, JR., CLERK

v.

WANDA JUNE WEEKS, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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**JURISDICTIONAL STATEMENT**

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ROBERT H. BORK,  
*Solicitor General,*

PETER R. TAFT,  
*Assistant Attorney General,*

KENNETH S. GELLER,  
*Assistant to the Solicitor General,*

EDMUND B. CLARK,  
EDWARD J. SHAWAKER,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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**In the Supreme Court of the United States**

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No.

THOMAS A. KLEPPE, SECRETARY OF THE INTERIOR,  
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v.

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*ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF OKLAHOMA*

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**JURISDICTIONAL STATEMENT**

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**OPINION BELOW**

The opinion of the three-judge district court (J.S. App. 1a-87a)<sup>1</sup> is not yet reported.

**JURISDICTION**

The judgment of the three-judge district court was entered on December 18, 1975 (J.S. App. 88a-89a). A notice of appeal was filed on January 16, 1976 (App., *infra*). On March 4, 1976, Mr. Justice White extended the time for docketing the appeal to and including April 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

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<sup>1</sup>"J.S. App." references are to the appendix to the Jurisdictional Statement of Appellants Delaware Tribal Business Committee, *et al.*, in No. 75-1301.

### QUESTION PRESENTED

Whether 25 U.S.C. (Supp. IV) 1291-1297, which authorizes the payment of funds to members of two federally-recognized tribes of Delaware Indians pursuant to a judgment of the Indian Claims Commission, denies due process of law under the Fifth Amendment by excluding descendants of Delaware Indians who voluntarily severed their relations from the tribe more than a century ago.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be \* \* \* deprived of \* \* \* property, without due process of law \* \* \* .

The Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, is set forth at J.S. App. 94a-97a.

### STATEMENT

1. The Delaware Indians originally lived on the east coast of what is now the United States but, by the second decade of the 19th century, they were geographically scattered. Although the main branch of the tribe lived in Indiana and Ohio, some members (the Muncie Indians) resided in New England and Canada, while others lived on a tract of land in Missouri that had been granted by Spain in 1793, and still others were located in Texas, Arkansas, and Oklahoma. In the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana to the United States in return for a promise of land west of the Mississippi River. The Delawares then moved to the Missouri tract, where they remained until 1829 (J.S. App. 6a-7a).

In September 1829, the Delawares signed another treaty with the United States, supplementing the 1818 treaty, in which they agreed to give up their temporary residence in

Missouri and to move to a permanent residence in Kansas. 7 Stat. 327. These Kansas lands purported to satisfy the federal government's obligation under the 1818 treaty to provide the Delawares with a home west of the Mississippi. Although most of the Delawares moved to the land assigned them in Kansas, a substantial group (the Absentee Delawares) settled in Oklahoma, where they have maintained their tribal identity, with chiefs and a tribal council, to the present day (J.S. App. 7a-8a). The Absentee Delawares constitute a federally-recognized tribe.<sup>2</sup>

In 1854, the nucleus of the Delaware Tribe, then living in Kansas, entered into a treaty with the United States in which they ceded most of their lands to the federal government (10 Stat. 1048; J.S. App. 98a-106a). Part of this territory was reserved for the Delawares as a permanent home (the "diminished reserve"), while the bulk of the remainder (the "trust lands") was to be sold by the government at public auction with the proceeds going to the Delaware general tribal fund. In 1856 and 1857, however, the United States violated the terms of the treaty by improperly selling the trust lands without a public auction. As a result, the Delawares received far less money from the disposition than they should have obtained (J.S. App. 8a).

Finally, in 1866, the Delawares entered into another treaty with the United States in which they agreed to move to Indian Country in Oklahoma (14 Stat. 793; J.S. App. 107a-118a). Under the treaty, the diminished reserve was to be sold and the proceeds used to buy 160-acre tracts of land in Oklahoma for each tribal member. In addition, all adult Delawares were to be given the opportunity either to remove to Oklahoma with

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<sup>2</sup>The Absentee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1335.

the tribe or, instead, to dissolve all tribal relations and to become citizens of the United States. Each Delaware who chose to leave the tribe was to receive fee simple title to an 80-acre plot in the reserved Kansas lands and his *pro rata* portion of the tribal assets (J.S. App. 9a). The treaty further provided that Indians electing to become citizens of the United States "shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities" (14 Stat. 796; J.S. App. 114a). Appellees, the so-called "Kansas 'Delawares'," are the descendants of those Indians who elected to sever all relations with the Delaware Tribe in 1866, to receive their proportionate share of the tribal assets, and to remain in Kansas as American citizens (J.S. App. 9a-10a).<sup>3</sup>

By 1867 most of the Delawares had moved to Oklahoma, where they each received a life estate of 160 acres of land on the Cherokee reservation. Although these Indians became members and citizens of the Cherokee Nation, they retained a group identity as Delawares (J.S. App. 10a-11a). Their descendants are the Cherokee Delawares, a federally-recognized tribe.<sup>4</sup>

2. In 1951, members of the Absentee Delaware Tribe filed suit in the Indian Claims Commission on behalf of the Delaware Nation to challenge as inadequate the

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<sup>3</sup>A total of 21 adults and 49 minors chose to remain in Kansas. The minors did not formally become citizens of the United States until 1874, when Congress appropriated funds to pay them a proportionate share of the assets of the Delaware Tribe and directed the Secretary of the Interior to issue fee simple title to lands allocated to them in the 1866 treaty (18 Stat. 146, 175; J.S. App. 12a).

<sup>4</sup>The Cherokee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1335.

compensation received under the 1818 treaty. The Commission found that the value of the Indiana lands ceded to the United States in 1818 was greatly in excess of the value of the Kansas lands received by the Delawares in return in 1829, and awarded \$1,627,244.64 to the Delaware Nation (J.S. App. 12a). By Act of September 21, 1968, 82 Stat. 861 *et seq.*, 25 U.S.C. 1181-1186, Congress appropriated funds to satisfy this judgment and ordered the Secretary of the Interior to distribute the funds to the following (25 U.S.C. 1181; J.S. App. 92a):

- (a) Indians whose "name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906"; or
- (b) Indians whose "name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior"; or
- (c) Indians who "are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary."

Thus, the Cherokee Delawares (through the first provision), the Absentee Delawares (through the second provision), and the Kansas "Delawares" (through the third, or "catchall," provision) all were eligible to participate in this distribution.

Subsequently, the Absentee and Cherokee Delawares brought a second suit in the Indian Claims Commission

for an accounting under the 1854 treaty relating to the sale of the "trust lands." The Commission concluded that these lands had not been sold at public auction, contrary to the terms of the treaty, and awarded the Delawares \$9,168,171.13, including interest from 1857. In the Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, however, Congress adopted a distribution plan for payment of this judgment that differed from the distribution set forth in 25 U.S.C. 1181-1186: ten percent of the award was to be paid directly to the Cherokee and Absentee Delaware Tribes for uses approved by the Secretary, while the remaining ninety percent was to be divided among individual tribal members in categories (a) and (b) above. Thus, since the "catchall" provision (c) was not included in the distribution statute, the Kansas "Delawares" did not share in the second award (J.S. App. 15a-17a).

3. Appellees, representatives of a class of approximately 600 descendants of the Kansas "Delawares," instituted this action in the United States District Court for the Western District of Oklahoma against the Secretary of the Interior and the Cherokee and Absentee Delawares to challenge the constitutionality of the distribution statutes, 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297. Specifically, appellees alleged that 25 U.S.C. (Supp. IV) 1292 violated principles of equal protection embodied in the Due Process Clause of the Fifth Amendment by excluding them from sharing in the second Indian Claims Commission award and that their exclusion amounted to a taking of property without just compensation. They also challenged the inclusion of the Cherokee Delawares in the distribution provisions of 25 U.S.C. 1181-1186 and the inclusion of the Cherokee and Absentee Delawares in the distribution provisions of 25 U.S.C. (Supp. IV) 1291-1297.

A three-judge district court, with one judge dissenting, agreed with appellees that 25 U.S.C. (Supp. IV) 1291-1297 violated due process by arbitrarily deleting the Kansas "Delawares," whose ancestors were among the Indians injured by the government's breach of the 1854 treaty, from the class of persons entitled to share in the second distribution. Although the court majority conceded that the challenged statute involved no "suspect classification" or "fundamental interest," it concluded that the Kansas "Delawares" exclusion from the distribution provisions had no rational basis (J.S. App. 29a, 35a-51a). Therefore, the court declared the statute unconstitutional and enjoined the Secretary from distributing the funds appropriated thereunder. The court rejected the attack on 25 U.S.C. 1181-1186 and denied all other relief requested by the appellees (J.S. App. 64a).<sup>5</sup>

#### THE QUESTION IS SUBSTANTIAL

This appeal presents an important question concerning the scope of congressional power over Indian affairs and the proper application of the Due Process Clause to legislation affecting the distribution of tribal property. In our view, the district court erroneously concluded that Congress is constitutionally prohibited from favoring members of federally-recognized Indian tribes over descendants of Indians who long ago severed their relations with the tribe. This decision is inconsistent with the Court's holding in *Morton v. Mancari*, 417 U.S. 535, that Congress may legitimately favor tribal Indians and that the determination of who are tribal Indians is not fixed by lines of descendency or race; it conflicts with the repeated holdings of this Court emphasizing the broad latitude Congress has in dealing with Indian affairs and Indian tribal property; and it casts

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<sup>5</sup>The Kansas "Delawares" have sought review of this portion of the district court's judgment in No. 75-1328.

doubt upon the constitutionality of other statutes specifying the manner of distribution of tribal assets.<sup>6</sup>

1. The district court concluded that 25 U.S.C. (Supp. IV) 1291-1297 violated the Due Process Clause because it "rests on no foundation rationally related to a legitimate governmental interest \* \* \* " (J.S. App. 50a). Congress, however, did not act irrationally in excluding the Kansas "Delawares" from the distribution authorized by the statute. Unlike the Cherokee and Absentee Delawares, who continue to the present day to live on Indian reservations as members of an Indian tribe, the Kansas "Delawares" are American citizens who are scattered throughout the country, who are in no sense an Indian tribe, and whose ancestors took their proportionate share of the Delaware tribal assets and renounced tribal membership more than a century ago.

Congress' determination to favor tribal Indians in the allocation of tribal funds was therefore not arbitrary or capricious. Indeed, a similar legislative decision to grant hiring preferences in the Bureau of Indian Affairs to tribal Indians was recently upheld in *Morton v. Mancari*, *supra*. This Court acknowledged in *Mancari* (417 U.S. at 553, n. 24) that the preference applied only to members of "federally recognized" tribes, rather than to individuals racially classifiable as Indians, but concluded (417 U.S. at 552) that "[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations." See also *Fisher v.*

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<sup>6</sup>Congress has the power to specify the persons who are tribal members for purposes of the distribution of tribal funds, so long as those persons have a tribal relationship. See *Sizemore v. Brady*, 235 U.S. 441, 447; Cohen's *Handbook of Federal Indian Law* 98-99 (1942).

*District Court*, No. 75-5366, decided March 1, 1976, slip op. 8-9.

This crucial distinction between tribal and non-tribal Indians, and the federal government's historic relationship to each, is sufficient to justify the difference in treatment accorded the Kansas "Delawares" by 25 U.S.C. (Supp. IV) 1291-1297, especially in view of the repeated pronouncements by this Court of the broad authority of Congress to distribute tribal property in the manner it views as most beneficial to the affected Indians. See, e.g., *United States v. Jim*, 409 U.S. 80; *Simmons v. Seelatsee*, 384 U.S. 209, affirming, 244 F. Supp. 808 (E.D. Wash.); *Board of County Commissioners v. Seber*, 318 U.S. 705, 718; *Winton v. Amos*, 255 U.S. 373, 391; *Williams v. Johnson*, 239 U.S. 414, 420; *Sizemore v. Brady*, 235 U.S. 441, 449; *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565.

In *Sizemore v. Brady*, *supra*, for example, the Court upheld the power of Congress to amend acts granting allotments of land and money to individual Indians, stating (235 U.S. at 449):

The lands and funds to which [the allotment statute] related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to relatives of deceased members the lands and money to which the latter would be entitled, if living.

Similarly, in *United States v. Jim, supra*, the Court recently reaffirmed this broad congressional power in upholding a statute enlarging the class of persons within the Navajo Tribe of Indians entitled to share in royalties from minerals found on the reservation (409 U.S. at 83):

Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the \* \* \* royalties \* \* \* in a more efficient and equitable manner. This was well within the power of Congress to do. As no "property," in a Fifth Amendment sense, was conferred upon residents of the [reservation] \* \* \*, no violation of the Fifth Amendment was effected by the \* \* \* legislation.

Indeed, Congress was empowered to act here not only under its constitutional authority "[t]o regulate Commerce \* \* \* with the Indian Tribes" (Article I, Section 8, Clause 3), but also under Article 8 of the 1854 treaty, which provided (10 Stat. 1050; J.S. App. 102a):

Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said [trust] lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

The distribution statute enacted by Congress is within this wide authority, has a rational basis that is readily apparent, and hence does not violate the principles of equal protection that inhere in the Due Process Clause of the Fifth Amendment.

2. By rejecting the decision of Congress to distribute the judgment of the Indian Claims Commission to tribal members as reflected on the 1906 and 1940 tribal rolls,

and by interpreting the Due Process Clause to require, in essence, a *per capita* distribution of the judgment to *all* lineal descendants of members of the tribe at the time of the alleged wrong, the decision of the district court calls into question the validity of similar federal legislation and imposes a severe administrative burden upon the Secretary.

Several other past and present distribution statutes have authorized *per capita* payments to Indians who are either on, or descended from persons on, specified tribal rolls, without providing express "catchall" coverage for all descendants of members of the injured tribe on the exact date of injury. See, e.g., 25 U.S.C. 788a-788h (Creeks); 25 U.S.C. 1051-1055 (Tillamooks); 25 U.S.C. (and Supp. IV) 1111-1130 (Miamis); 25 U.S.C. 1221-1227 (Weas, Piankashaws, Peorias and Kaskaskias). Thus, the legality of thousands of Indian distributions involving hundreds of millions of dollars may be in doubt. The court's decision may also prevent the congressional practice of distributing a portion of an Indian Claims Commission judgment to the existing tribal governments for common tribal needs (see, e.g., 25 U.S.C. (Supp. IV) 1403(b)(5)),<sup>7</sup> despite the fact that the award redresses a wrong to the *tribe* rather than to individual Indians (see *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307).

Moreover, compliance with the district court's judgment would require the development of new tribal rolls, rather

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<sup>7</sup>25 U.S.C. (Supp. IV) 1294 contains a similar provision, allocating ten percent of the judgment funds for tribal use. In view of its decision striking the entire statute, the district court did not specifically address the validity of that provision (J.S. App. 17a-18a, n. 20).

than the use of existing tribal rolls, whenever an Indian Claims Commission award is to be distributed—a task that Judge Daugherty, dissenting below, correctly termed “horrendous” (J.S. App. 86a).<sup>8</sup> Congress could rationally determine not to place that enormous administrative burden on the Secretary, at costs frequently not justified by the amount of the *per capita* distribution, particularly when the injury may have occurred at different times, when separate groups of Indians may therefore be eligible to share in the award, and when complex descendancy determinations; involving events more than a century old, would be necessary. See *Weinberger v. Salfi*, 422 U.S. 749, 777.

### CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,  
*Solicitor General.*

PETER R. TAFT,  
*Assistant Attorney General.*

KENNETH S. GELLER,  
*Assistant to the Solicitor General.*

EDMUND B. CLARK,  
EDWARD J. SHAWAKER,  
*Attorneys.*

APRIL 1976.

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<sup>8</sup>The 1906 roll involved in the present case would have included the Kansas “Delawares” except for a determination at that time that Indians who had severed their tribal relations could not participate in a distribution of funds to the Cherokee Delaware Tribe under the Act of April 21, 1904, 33 Stat. 189, 222, which appropriated \$150,000 in settlement of various Delaware claims against the United States. See *Annual Report of the Department of the Interior, 1906*, p. 223.

**APPENDIX**

**IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA**

WANDA JUNE WEEKS,	)	
Plaintiff	)	CIVIL NO. 73-586-E
vs.	)	
THOMAS J. KLEPPE, SECRE-	)	
TARY OF THE INTERIOR OF	)	
THE UNITED STATES OF	)	
AMERICA AND TRUSTEE FOR	)	
THE DELAWARE INDIAN PEOP-	)	
LE; THE DELAWARE TRIBAL	)	
BUSINESS COMMITTEE; THE	)	
ABSENTEE DELAWARE TRIBE	)	
OF OKLAHOMA BUSINESS	)	
COMMITTEE; BRUCE MILLER	)	
TOWNSEND; NATHAN H.	)	
YOUNG; MARY TOWNSEND CROW;	)	
HENRY A SECONDINE; Y. A.	)	
SCOTT; ARTHUR L. THOMAS;	)	
ALENE MARTINEX; MYRTLE	)	
HOLDER; TOMMY HOLDER; LAW-	)	
RENCE SNAKE; CHARLES TAY-	)	
LOR; CLIO CHURCH; MABEL	)	
MURRAY; AND GRACE SPOON-	)	
ER ROSE.	)	
Defendants	)	
and	)	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH	)	
RATTLER, on their own behalf	)	
and on behalf of all those similarly	)	
situated,	)	
Plaintiffs	)	

VS.	)	
THOMAS J. KLEPPE, individu-	)	CIVIL NO. 74-368-D
ally and in his capacity as Secretary	)	
of the Interior of the United States	)	
of America,	)	
	)	
Defendant,	)	
THE DELAWARE TRIBE OF	)	
INDIANS, THE ABSENTEE DEL-	)	
AWARE CLASS on behalf of the	)	
DELAWARE TRIBE OF WESTERN	)	
OKLAHOMA,	)	
	)	
Intervenors	)	

### NOTICE OF APPEAL

Notice is hereby given that the defendants, Stanley K. Hathaway (now Thomas J. Kleppe), individually and in his capacity as Secretary of the Interior of the United States of America, hereby appeals to the United States Supreme Court from the Order and Judgment, entered in the Three-Judge District Court in this action on December 18, 1975.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

DAVID L. RUSSELL  
United States Attorney

/s/ Givens L. Adams  
GIVENS L. ADAMS  
Assistant U.S. Attorney

Attorney for the said Defendant,  
Secretary of the Interior of  
the United States

Filed: January 16, 1976.



MAY 17 1976

MICHAEL RODAK, JR., CLERK

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In the  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1975

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**No. 75-1495**

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THOMAS A. KLEPPE, Secretary of the Interior, ET AL.,  
*Appellants,*

VERSUS

WANDA JUNE WEEKS, ET AL.,  
*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA

---

**MOTION TO DISMISS OR AFFIRM**

---

DELMER L. STAGNER

STEPHEN P. FRIOT

*Attorneys for Appellees*

*of Counsel:*

SPRADLING, STAGNER, ALPERN & FRIOT  
Suite 700, Continental Savings Building  
101 Park Avenue  
Oklahoma City, Oklahoma 73102

HENRY B. TALIAFERRO, JR.  
CASEY, LANE & MITTENDORF  
815 Connecticut Avenue N.W.  
Washington, D.C. 20006

May, 1976



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In the  
Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-1495

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THOMAS A. KLEPPE, Secretary of the Interior, ET AL.,  
*Appellants,*

V E R S U S

WANDA JUNE WEEKS, ET AL.,  
*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA

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**MOTION TO DISMISS OR AFFIRM**

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Appellees, Wanda June Weeks, Dorothy Frazier and Ruth Rattler, individually and on behalf of the Kansas Delaware class, move the Court, pursuant to Rule 16 of the Rules of this Court, to dismiss the appeal docketed herein by Thomas A. Kleppe, Secretary of the Interior of the United States, for the reason, as is more fully set forth herein, that the questions upon which the decision of this cause depend are so insubstantial as not to need further argument and for the further reason that the Jurisdictional Statement by which the appeal of Thomas A. Kleppe is lodged proceeds upon factual premises which are not supported by the record, but, in fact, are negated by the record.

In the alternative, these Appellees move to summarily affirm the judgment of the District Court on the merits, insofar as the same grants relief to these Appellees, for the reason that said Judgment, the Memorandum Opinion filed therewith, and the factual bases therefor rest upon such firm, legally and factually correct, and closely circumscribed grounds as not to present the perils asserted by said Appellant in his Jurisdictional Statement, and, therefore, present no occasion for plenary review.

### **ARGUMENT**

The Kansas Delaware class, represented in this action by Wanda June Weeks, Dorothy Frazier and Ruth Rattler, Appellees, respond to the Jurisdictional Statement of the Secretary of the Interior as follows:

#### **Question Presented**

(As stated by the Appellant, Thomas A. Kleppe)

“WHETHER 25 U.S.C. (Supp. IV) 1291-1297, WHICH AUTHORIZES THE PAYMENT OF FUNDS TO MEMBERS OF TWO FEDERALLY-RECOGNIZED TRIBES OF DELAWARE INDIANS PURSUANT TO A JUDGMENT OF THE INDIAN CLAIMS COMMISSION, DENIES DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT BY EXCLUDING DESCENDANTS OF DELAWARE INDIANS WHO VOLUNTARILY SEVERED THEIR RELATIONS FROM THE TRIBE MORE THAN A CENTURY AGO.”

This statement by the Appellant of the Question Presented contains a misstatement of the provisions of 25 U.S.C. §§1291-1297.

The statute provides for payments to individuals on a per capita basis whose names were on, or the name of an ancestor was on (or in the case of the Absentee Delawares, was *eligible* to be on) two rolls, neither of which were tribal rolls at the time they were prepared and certainly are not tribal rolls today. Further, in the case of the Absentee Delawares, the "eligible to be on" provision was inserted for the reason that tribal membership is limited to Indians of 1/8th Delaware Indian blood or more and the distribution was to be made to *non-tribal Indians* who have less than 1/8th Delaware blood. As stated by the District Court:

"In actuality, modern tribal membership of one of the benefited groups, the Absentee Delawares, is not followed in the statutory distribution under 25 USCA §1292 (c) (2). *E.g.*, a person born after July 30, 1957, must have 1/8 Delaware blood in order to be recognized as a member of the Absentee Delaware Tribe. See Defendant Absentee Delawares' Ex. 9 and 28. However, for distribution under §1292(c)(2) such person need only show that his lineal ancestor's name is on or eligible to be on the constructed base census roll of the Absentees as of 1940, in which case he may thus participate in the distribution though he has less than 1/8 Delaware blood" (J.S. App. 48(a), n. 40).

The 1906 per capita payroll (25 U.S.C. §1292(c)(1)) was a roll of those emigrant Delawares who lived in the Cherokee Nation, compiled only for the purpose of distributing monies to that band of the Cherokee Nation (J.S. App. 13a, 14a, n. 15). These facts are clear from the record and refute any allegation that the rolls designated in the statute are tribal rolls.

Further, the "Delaware Tribe of Indians" was not a federally recognized tribe. The statute itself recognizes this and provides for no use of funds until a legal entity is formed. See 25 U.S.C. §1294. The organization that calls itself the "Delaware Tribe of Indians" was granted *limited* federal recognition only *after* the instant suit was filed (J.S. App. 18a, 19a, n. 20; compare 25 U.S.C. §1294(b) (proviso) with 25 U.S.C. §§477, 503).<sup>1</sup>

The Question Presented refers to the Kansas Delaware class as "descendants of Delaware Indians who voluntarily severed their relations from the tribe more than a century ago." This is both a misleading and an unfair characterization of their status.

The adult Kansas Delawares who are ancestors of the present members of the excluded class severed their relations with the tribe on the *express condition* that they would receive their pro-rata share of the very fund which is made whole by the funds appropriated to pay the Indian Claims Commission judgment and which are the subject of the challenged statute (Article 9, Treaty of 1866, J.S. App. 113a).

Further, the members of the present Kansas Delaware class are also descendants of Kansas Delawares who were minors when their parents resigned from the tribe, and such minors never severed their relations with the tribe (J.S. App. 11a, 12a).

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<sup>1</sup> "J.S.App." references are to the Appendix to the Jurisdictional Statement of the Appellants Townsend, et al., members of the Cherokee Delaware class, for the reason that the Jurisdictional Statement of the Appellant Thomas A. Kleppe likewise refers to said Appendix.

The footnote on page 4 of the Secretary of the Interior's Jurisdictional Statement which states that "[a] total of 21 adults and 49 minors chose to remain in Kansas . . ." is inaccurate. The minors who are the ancestors of the present Kansas Delawares did not *choose* to remain in Kansas. The Treaty of 1866, Article 9, provided that they were *required* to remain with their parents in Kansas, but that they each had the option of remaining in Kansas or joining the tribe when they reached majority. The next year, the tribe entered into an agreement with the Cherokee Nation under the terms of which the Delaware Tribe of Indians was dissolved and abandoned and each Delaware Indian became a member of the Cherokee Nation. *Cherokee Nation v. Journeycake*, 155 U.S. 196, 5 S.Ct. 55, 39 L.Ed. 120 (1894). The Kansas Delaware minors were ineligible to become members of the Cherokee Nation under this agreement and they, thus, had no option upon reaching majority of severing their relation with the tribe (J.S. App. 12a, Text at n. 13) because the tribe no longer existed as a political body. The Cherokee Delawares became a band of the Cherokee Nation, and maintained *group* identity, having tribal chiefs and business committees until the present time (J.S. App. 11a, note 12). However, this group was not a "tribe" and the minor Kansas Delawares were not members of the group and could not sever their relation with the "tribe" since none existed. The Kansas Delawares are, thus, descendants of non-expatriated members of the historical tribe.

The District Court found that the three classes of claimants had equal standing in their claims to share in the subject fund (J.S. App. 50a). The only issues involved

are whether the District Court was correct in its finding that there was "equal standing" and whether, assuming that there was equal standing, there was a supporting rationale for the exclusion of the Kansas Delaware class.

The finding by the District Court that the claim of the Kansas Delaware class to a right to share in the fund was on equal standing with the other two classes does not present a constitutional question for this Court. This finding of equal standing, based upon the historical record, was a factual determination amply supported by the historical events and the evidence before the District Court. Indeed, it was the only rational conclusion which could have been reached by the District Court.

#### **Substantiality of Question**

In his discussion of the substantiality, the Secretary states that the Question Presented presents the important question of the "scope of Congressional power over Indian affairs." No such question is raised by the Question Presented. Stripped of the surplus and misleading language, the Question Presented reads as follows: "Whether 25 U.S.C. (Supp. IV) 1291-1297 denies due process of law under the Fifth Amendment by excluding the [Kansas Delaware] Indians." The "scope of Congressional power" is not involved in this Statement, as framed by the Secretary, unless the Secretary means to imply that Congress has the power to deny due process of law to fully emancipated non-ward Indians, an implication which would be summarily rejected by the Court if stated expressly.

The other question which the Secretary states is presented concerns "the proper application of the Due Process clause to legislation affecting distribution of tribal funds." The funds involved are not "tribal funds," but are Congressionally appropriated (83 Stat. 447, 453) public funds designated, subsequent to appropriation, for distribution to *individuals* without regard to tribal membership, to pay an Indian Claims Commission judgment to present representatives of the historical tribal entity that was wronged, which historical tribal entity was thereafter dissolved.

The case of *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), cited and relied upon by the Secretary, involves the power of Congress to favor Indians by singling out for special treatment a "constituency of tribal Indians living on or near reservations." 417 U.S. at 552, 94 S.Ct. at 2483, 41 L.Ed.2d at 302. "Indians," within the meaning of the Act involved in *Mancari*, are defined by 25 U.S.C. §479 to be "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation and shall further include all persons of one-half or more Indian blood." The special relationship between the government and Indians who are "on or near" reservations provided a unique legal status which was the basis for affirming the power of Congress to confer special employment favors.

This Court said that the exemptions reveal a clear Congressional sentiment that an Indian preference *in the narrow context of tribal or reservation-related employment*

did not constitute racial discrimination. It was recognized by this Court that Indians, as defined in the Act, constituted a unique class. This Court said:

“Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes. . . .” 417 U.S. at 551, 94 S.Ct. at 2483, 41 L.Ed.2d at 301.

“The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.” 417 U.S. at 554, 94 S.Ct. at 2484, 41 L.Ed.2d at 302.

Here, the “favored classes” are not ward Indians, and are not on or near reservations; they are fully assimilated Indians whose only interest in the appropriated funds is their ancestral ties to the members of the tribe at the time it was wronged (ties which are identical with those of the Kansas Delaware class). The *Mancari* case, *supra*, affords no basis for the invidious discrimination between the classes of such persons.

Given the fact that these funds were specifically directed to be distributed to *individual Indians* (25 U.S.C. §1292) *regardless of tribal membership* (J.S. App. 13a, n. 15; 48a, n. 40), all of whom are emancipated United States citizens (48 Stat. 253), the only holding which would be sufficient to overturn the judgment of the District Court would be a holding that where a distribution of benefits is Indian-related, and the statutorily designated recipients

(as well as those who challenge the distribution scheme) have Indian blood, the Indian connection and the Indian blood of the recipients and the challengers, without more, are sufficient to close the doors of the federal courts and bar redress sought on constitutional grounds. Such a holding would fly in the face of over 100 years of constitutional precedent delineating the arena within which the dominating force of the plenary power operates and tying its exercise to matters of reserved ward Indians,<sup>2</sup> crimes in Indian country,<sup>3</sup> tribal lands,<sup>4</sup> tribal recognition,<sup>5</sup> tribal membership<sup>6</sup> or tribal welfare.<sup>7</sup> Without these boundaries, the "plenary power of Congress in Indian affairs" would be tied only to race and would become all-pervasive, creating a permanently blighted sub-class of sub-citizens.

*Sizemore v. Brady*, 235 U.S. 441, 35 S.Ct. 135, 59 L.Ed. 308 (1914), cited in support of the position of the Secretary, upheld a statute providing for devolution of tribal lands held in trust for the tribe to tribal members. It was asserted that the Due Process clause of the Fifth Amendment to the Constitution limited the power of Congress to provide for a distribution which was different than that provided in a prior statute. The power of Congress to change the devo-

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<sup>2</sup> *Elk v. Wilkins*, 112 U.S. 94, 99-100, 5 S.Ct. 41, 28 L.Ed. 643 (1884).

<sup>3</sup> *United States v. Ramsey*, 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926).

<sup>4</sup> *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 23 S.Ct. 115, 47 L.Ed. 183 (1902).

<sup>5</sup> *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913).

<sup>6</sup> *Stephens v. Cherokee Nation*, 174 U.S. 445, 19 S.Ct. 722, 43 L.Ed. 1041 (1899).

<sup>7</sup> *Quick Bear v. Leupp*, 210 U.S. 50, 28 S.Ct. 690, 52 L.Ed. 950 (1908).

lution of tribal property was affirmed on the basis that while such property was still tribal and not individual, Congress was acting within its plenary power. The Court noted, however, that the plenary power of Congress did not extend to actions carrying the statute into effect and stated that rights created by the agreement could not be divested or impaired, citing *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941. This Court said, regarding the power of Congress:

" . . . It was but an exertion of the administrative control of the government over the *tribal property* of *tribal Indians*, and was subject to change by Congress at any time before it was carried into effect, *and while the tribal relations continued.*" 235 U.S. at 450, 35 S.Ct. at 137, 59 L.Ed. at 312. (Emphasis added.)

This case does not support the assertion that Congress has plenary power over fully assimilated Indians not residing on or near reservations, who own no reservations and the property involved is not tribal in any present sense. Further, the exception noted in *Choate v. Trapp*, *supra*, applies since the right of the adult Kansas Delawares to share in the fund was guaranteed to them by the Treaty of 1866 as a condition to their resignation from the tribe.

The Secretary, on page 8 of his Jurisdictional Statement, states the basic premise underlying the whole argument in his Jurisdictional Statement. The Secretary says: "Unlike the Cherokee and Absentee Delawares, who continue to the present day to live on Indian reservations as members of an Indian tribe, the Kansas Delawares are American citizens . . ." (J.S. 8). This statement could mislead this Court into assuming that the basis for the dis-

crimination in favor of Indians approved in the *Mancari* case is present in this case.

The referenced statement is wholly wrong for two reasons: (1) There are no Indian reservations in Oklahoma where most of the Cherokee and Absentee Delawares reside; and (2) The members of the Cherokee Delaware and Absentee Delaware classes are scattered throughout the United States.

In answer to Requests for Admissions in the District Court, the Defendants admitted that the Cherokee Delawares and the Absentee Delawares own no reservations, are not tribal corporations (25 U.S.C. §§477, 503), have no judicial systems or judicial powers, and are scattered over many, probably 25 or more, states. Thus, the statement by the Secretary (J.S. 8), upon which he so heavily relies as a factual premise for his legal argument (based upon *Morton v. Mancari, supra*), is wholly untrue, as shown by the record, and as we are sure the Secretary, upon examination, would acknowledge.

The Chairman of the Business Committee of the Cherokee Delawares testified before the Congressional subcommittee that the only roll of his "tribe" was the list of persons who shared in the distribution of Docket 337 funds, a list that included Kansas Delawares. Its present "roll" is provided in its Constitution to be those persons eligible to share in the Docket 72 and 298 funds.

There is not a single reference in the evidence to support the statement that members of such classes live on reservations. Neither the statement of facts by the majority opinion nor the dissenting opinion support such a state-

ment and we submit that the jurisdiction of this Court should not be invoked by such a misrepresentation of the status of the favored classes.

The Secretary notes that the distinction between tribal and non-tribal Indians is a crucial distinction which justifies discrimination between the two. That issue is not presented in this case and the statutory discrimination found to exist by the District Court cannot be justified by this non-existent distinction.

Reliance by the Secretary on the other cases cited on page 9 of the Jurisdictional Statement is likewise misplaced since each of such cases involved intra-tribal matters or distribution of tribal property.

In the *United States v. Jim*, 409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 335 (1972), all of the Indians involved were ward Navajo tribal Indians and the mineral interests involved belonged to the tribe. The distinction between that case and the instant one is obvious. As to the well-recognized legal status and factual attributes of the Navajo tribe, See 25 U.S.C. §§621, *et seq.* and *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), *cert. den.* 393 U.S. 1018 (1968).

The Secretary then attempts to find the power of Congress to distribute funds in an invidiously discriminatory manner in the wording of Article 8 of the 1854 treaty with the Delaware tribe. Legislative power obviously cannot be expanded by a treaty, nor can the Due Process clause of the Fifth Amendment be annulled by a treaty with an Indian tribe. *Jones v. Meehan*, 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49 (1899). (See discussion by the District Court of this con-

tention at J.S. App. 46a.) Further, pursuant to Article 8 of the 1854 treaty, Congress, in the Treaty of 1866, did provide for an application of funds from the sale of said trust lands. In Article 9 of the Treaty of 1866, it was provided that the ancestors of the Kansas Delawares would receive their pro-rata share of such funds! This case involves an attempt to obtain for the Kansas Delawares that pro-rata share.

The Secretary next suggests that the decision of the District Court "calls into question the validity of similar federal legislation and imposes a severe administrative burden upon the Secretary."

#### **Similar Legislation**

The District Court did not, as suggested, require, in essence, a *per capita* distribution of the judgment to all lineal descendants of members of the tribe at the time of the alleged wrong. The District Court's decision only requires that if Congress is to provide for a distribution on a per capita basis to lineal descendants, it must provide a plan which includes representatives of those who suffered the wrong and cannot arbitrarily and capriciously exclude a class of descendants who have equal standing with those included. This is especially so where the ancestors of the excluded class were, by the Treaty of 1866, guaranteed their pro-rata part of the fund as a condition to their resigning from the tribe.

The Secretary suggests that other past distribution statutes may be illegal because they did not have "catch-all" coverage for all descendants of members of the injured

tribe on the exact date of the wrong, but which statutes did provide for distribution to persons on specified tribal rolls.

In the first place, the District Court did not find the subject legislation to be invalid because it did not provide for "catch-all" coverage. The members of the Kansas Delaware class are descendants from a *specified roll*, viz., the registry prepared pursuant to Article 9 of the Treaty of 1866 (J.S. App. 9a, 10a). No "catch-all" provision was necessary to include them. Congress need only to have declared ancestral ties to the persons on such specified registry as an additional basis for eligibility, exactly as was done with respect to the Cherokee Delaware and Absentee Delaware fund applicants. 25 U.S.C. §1292(c)(1) and (2).

Secondly, it is not shown that the cited statutes which the Secretary suggests may be illegal exclude descendants of members of the wronged tribe.<sup>8</sup>

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<sup>8</sup> Contrary to the Secretary's suggestion, 25 U.S.C. §788(a)-788(h) (Creeks) has a "catch-all" in the following language:

"... (b) their names or the names of lineal ancestors appear on any of the documents identified herein or on any available census rolls or other records acceptable to the Secretary, which identify the person as a Creek Indian, including ancient documents or records of the United States located in the National Archives, State or county records in the archives of the several States or counties therein or in the courthouses thereof, and other records that would be admissible as evidence in an action to determine Indian lineage."

25 U.S.C. §§1051-1055 (Tillamooks) provides for eligibility based upon a census roll dated January 28, 1898, or an annuity payment roll prepared in 1914. There is no suggestion that these two rolls do not include all persons whose ancestors were members of the tribe at the time of the wrong.

25 U.S.C. (Supp. IV) §§1111-1130 (Miamis) provide for eligibility based upon two 1895 rolls of the Miami Indians, an 1889 roll and, for the Miami Indians of Oklahoma, a roll of the Western Miami Tribe of Indians of 1891. There is no suggestion that these four rolls do not

The suggestion that the decision in this case may "prevent the Congressional practice of distributing a portion of an Indian Claims Commission judgment to the existing tribal governments for common tribal needs" is not correct. The District Court in its opinion made it clear that it was not finding the statute invalid because of provisions for distribution of a portion of the award for common use (J.S. App. 17a, n. 20; 25a, n. 23; and 65a). The statute had no separability clause and the portion of the statute providing for a distribution of 90% of the funds was invidiously discriminatory and void. The District Court said:

"... we cannot confidently say that Congress would have intended the continued operation of the remaining parts of the statute—such as the provision for withholding 10 percent of the awards in trust—if it had known that the statute would have to be subjected to an extension of its distributive provisions to include the Kansas Delawares." (J.S. App. 64a, See also n. 23, page 25a.)

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<sup>8</sup> (Continued)

include all persons whose ancestors were members of the tribe at the time of the wrong.

25 U.S.C. §§1221-1227 (Weas, Piankashaws, Peorias, and Kaskaskias) provide for eligibility based upon the final roll of the Peoria Tribe in 1956, the 1937 census of the Peoria tribe, the 1920 census of the Peoria tribe, the Indian or citizen class lists pursuant to the Treaty of February 23, 1867, or "(c) the Schedule of Persons or Families composing the United Tribes of Weas, Piankashaws, Peorias and Kaskaskias, annexed to the Treaty of May 30, 1854."

### Administrative Burden

It is suggested, as a rationale to support the discriminatory legislation, that compliance with the court's judgment would require the development of new tribal rolls rather than the use of existing tribal rolls, whenever an Indian Claims Commission award is to be distributed, asserting that this would place an enormous administrative burden on the Secretary.

This suggestion is a bugaboo.<sup>9</sup> The Kansas Delawares are descendants of persons on a given, recorded roll of 69 ancestors. This roll is in the record. The roll for the pay-

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<sup>9</sup> "Catch-all" provisions are in many distribution acts. See 25 U.S.C. §967(a) which included all Indians "who possess original Omaha blood of the degree of one-fourth or more."

See 25 U.S.C. §601 (Yakima Tribes) which provides eligibility for "all living persons who are of the blood of the fourteen original Yakima Tribes, parties to the treaty of June 9, 1855" and whose ancestors received certain allotments.

See 25 U.S.C. §1011 (Snake or Paiute Indians of Oregon) which provides for eligibility to all descendants of any members of the bands of Indians whose chiefs signed the treaty of December 10, 1868.

See 25 U.S.C. §1101 (Nooksack Tribe) which provided eligibility to "descendants of members of the Nooksack Tribe as it existed in 1855."

See 25 U.S.C. §1131 (Duwamish Tribe) which provided eligibility to "descendants of members of the Duwamish Tribe as it existed in 1855."

See 25 U.S.C. §1151 (Chehalis Tribe) which provided eligibility to "descendants of members of the Upper and Lower Chehalis Tribes as they existed in 1855."

See 25 U.S.C. §1232 (Chemehuevi Tribe) which provides for eligibility to "descendants of members of the Chemehuevi Tribe as it existed in 1860" and "on any other available census roll or other record or evidence acceptable to the Secretary."

In each distribution statute where Indian Claims Commission funds are to be distributed through the tribal entities to members of the tribe, it is necessary to prepare updated rolls under the supervision of the Secretary.

ment of Docket 337 funds (25 U.S.C. §1181) needs only to be opened and updated. There is no administrative burden in so doing which is any different than the use of rolls which form the basis for eligibility in all the distributions of Indian Claims Commission awards on a descendancy basis. "Tribal rolls" are not involved in this action. The reasoning of *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), is inapplicable because determinations as to whether one has an ancestor on a specified roll (as is required in all per capita distributions where eligibility is tied to a specific roll, cf. 25 C.F.R. Part 43j, §43j.6) do not involve subjective questions of motive, intent or state of mind, and one cannot fraudulently "arrange" his own birth (as distinguished from the "sham marriage" issue in *Salfi*).

Assuming, *arguendo*, that there would be an administrative burden involved in the preparation of the roll for distribution, this is no rationale to support the discrimination involved in this action. This Court said, in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972):

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

## CONCLUSION

This case presents the anomalous situation of the United States, having agreed by the Treaty of 1866 that resigning members of the Delaware tribe, as a *condition to such resignation*, were entitled to receive their pro-rata part of what is now an appropriated fund (Art. IX, Treaty of 1866, J.S. App. 113a), now seeking to deny the descendants of such resigning members a pro-rata share of such funds, asserting the rationale in support of such denial to be that *their ancestors resigned from the tribe*. The irrationality of such position is self-evident.

It is respectfully submitted that none of the suggested rationales offered in the Jurisdictional Statement of the Secretary of the Interior present a substantial question for this Court. No issue is taken with the jurisdiction of the District Court nor the standard employed by the District Court in determining whether the subject legislation met the constitutional standards of Due Process.

The opinion of the District Court makes it abundantly clear that the exclusion of the Kansas Delaware class was not only arbitrary and capricious, but, in fact, was not a deliberate exclusion. It resulted from erroneous information given to the Committees considering the legislation (J.S. 34a, 35). The wording of the legislation was adopted to exclude a wholly unrelated group of Indians (Munsees) who separated from the tribe long before the wrongs which were the basis for the award. There was no intent to exclude the Kansas Delaware class and the rationale offered in this action to support such exclusion was never considered by the Congress. *Id.* It is clear that the Committees

considering such legislation believed that all descendants of the tribe at the time of the wrong would be included by the utilization of the two rolls (J.S. App. 66a, 67a). It was expressly represented to such Committees that this would be the case (J.S. App. 67a).

The holding of the District Court that such statute was unconstitutional will now afford Congress an opportunity to accomplish what it intended to accomplish in the first instance. It is submitted, therefore, that the instant appeal should be summarily affirmed on the merits, or dismissed.

Respectfully submitted,

DELMER L. STAGNER

STEPHEN P. FRIOT

*Attorneys for Appellees*

*of Counsel:*

SPRADLING, STAGNER, ALPERN & FRIOT

Suite 700, Continental Savings Building

Oklahoma City, Oklahoma 73102

Phone: 405/272-0211

HENRY B. TALIAFERRO, JR.

CASEY, LANE & MITTENDORF

815 Connecticut Avenue N.W.

Washington, D.C. 20006

Phone: 202/785-4949

May, 1976



### **CERTIFICATE OF SERVICE**

I, Delmer L. Stagner, a member of the bar of the United States District Court for the Western District of Oklahoma and a member of the bar of the Supreme Court of the United States, hereby certify that I did, on this \_\_\_\_\_ day of \_\_\_\_\_, 1976, serve three true and correct copies of the foregoing upon: Mr. B. J. Rothbaum, Jr., Tomerlin, High & Patton, 323 Fidelity Plaza, Oklahoma City, Oklahoma 73102, counsel of record for the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware class and the named individual members thereof; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Secretary of Interior of the United States; Mr. Bruce Miller Townsend, 201 Denver Building, Seventh and Denver, Tulsa, Oklahoma 74119 (counsel of record for Cherokee Delaware class and named individual members thereof; by placing the same in the United States mail, first class postage thereon fully prepaid; I further certify that I did, on this \_\_\_\_\_ day of \_\_\_\_\_, 1976, serve three true and correct copies of the foregoing upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue N.W., Washington, D.C. 20006, counsel of record for Wanda June Weeks; Messrs. Joseph S. Fontana and John R. Keys, Winston & Strawn, 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006, counsel of record for Cherokee Delaware class and named individual members thereof; Mr. George C. Christensen, Winston & Strawn, Suite 5000, One First National Plaza, Chicago, Illinois 60603, counsel of record for Cherokee De'aware class and named individual members thereof; and Mr. Duard Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for the Secretary of

the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this \_\_\_\_\_ day of \_\_\_\_\_, 1976, in conformity with 80 Stat. 613, 28 U.S.C. §518, serve three true and correct copies of the foregoing upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served.

---

Delmer L. Stagner



No. 75-1495

Supreme Court, U. S.

FILED

MAY 28 1976

MICHAEL RODAY JR. CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1975**

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**THOMAS S. KLEPPE, SECRETARY OF  
THE INTERIOR, ET AL., APPELLANTS**

**v.**

**WANDA JUNE WEEKS, ET AL.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

---

**REPLY MEMORANDUM FOR THE APPELLANTS**

---

**ROBERT H. BORK,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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## REPLY MEMORANDUM FOR THE APPELLANTS

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1. The principal contention in our jurisdictional statement was that the district court had given insufficient deference to the broad powers of Congress in the distribution of tribal property by holding that Congress could not favor the federally-recognized Absentee and Cherokee Delaware Tribes over the descendants of Indians whose tribal relations were severed more than a century ago. Appellees' response (Motion to Dismiss or Affirm 8, 9) is that the possession of a reservation is the *sine qua non* of Indian tribal existence, and they correctly note that the Cherokee and Absentee Delawares do not live on reservations.<sup>1</sup> But the Cherokee and Absentee Delawares are federally-recognized tribes and were so at the time that

---

<sup>1</sup>Because of the unique history of Oklahoma, there are presently few, if any, of the type of Indian reservations found in other states.

25 U.S.C. (Supp. IV) 1291-1297 was enacted.<sup>2</sup> They have tribal governments in which their members participate and which provide services (particularly social and health-related services) to the community, often under programs of the Bureau of Indian Affairs or in conjunction with other tribes.

Moreover, the fact that some members of these tribes may live outside of the formal tribal community does not distinguish the Cherokee or Absentee Delawares from other tribes with or without a reservation. Non-reservation tribes share with other Indian tribes the problem of being a culturally-distinct people in a Nation largely of non-Indians<sup>3</sup> and are deserving, as are other Indian tribes, of the protection of Congress. The important question is whether the federal government has acknowledged a responsibility towards these people as a group, through federal recognition of their tribe; where, as here, that recognition exists, tribal members are entitled to the unique treatment and protection upheld in *Morton v. Mancari*, 417 U.S. 535, 551. Appellees, as descendants of Indians whose tribal membership was severed more than a century ago,

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<sup>2</sup>Appellees' statement (Motion 4) to the contrary, concerning the Delaware Tribe of Indians (the Cherokee Delawares), is incorrect. See, e.g., the "Resolution Establishing By-laws Under Which the Delaware Tribal Business Committee Shall Speak and Act in Behalf of the Delaware Tribe of Indians," which was adopted on September 7, 1958, and was approved by the Commissioner of the Bureau of Indian Affairs on May 31, 1962 (Answer 50 to interrogatories to the Secretary of the Interior, with attachments). See also the Act of April 21, 1904, 33 Stat. 189, 222, which provides for payments to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct \* \* \*."

<sup>3</sup>Even Indian tribes possessing reservations often live in a community of non-Indians, particularly since much reservation land was long ago sold out of Indian ownership in order to encourage interaction among the races. See, e.g., *Mattz v. Arnett*, 412 U.S. 481, 496.

have failed to explain why Congress is powerless to treat their group differently from the Cherokee and Absentee Delawares.

2. Although appellees correctly contend (Motion 3-4) that membership in the Absentee Delaware Tribe does not precisely coincide with the persons specified in 25 U.S.C. (Supp. IV) 1292(c)(2), the persons specified in the statute bear a sufficiently close relationship with that tribe that they could be accorded full membership by the tribe. It is well established that Congress has the power to specify the persons who are tribal members for purposes of the distribution of tribal funds, as it has done here, so long as those persons have a tribal relationship. *Sizemore v. Brady*, 235 U.S. 441, 447; *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 813 (E.D. Wash.), affirmed, 384 U.S. 209; Cohen's *Handbook of Federal Indian Law* 98-99 (1941).

3. Appellees erroneously imply (Motion 7, 12) that the Indian Claims Commission judgment funds are not tribal property. However, since the money is recompense for a wrong done the tribe (the party to the breached treaty), not to individuals, the judgment funds are tribal rather than individual property. See *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307; *Minnesota Chippewa Tribe v. United States*, 161 Ct. Cl. 258, 270-271, 315 F.2d 906, 913-914; *Cherokee Freedmen v. United States*, 195 Ct. Cl. 39, 50-51.<sup>4</sup>

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<sup>4</sup>The fact that Article IX of the Treaty of July 4, 1866, 14 Stat. 793, makes payable to persons leaving the Delaware Tribe a just proportion of the assets "*then held in trust by the United States*" (emphasis added) certainly did not vest the Kansas "Delawares" with a right to a distribution under an Indian Claims Commission judgment nearly 100 years later. The Just Compensation Clause of the Fifth Amendment therefore did not prevent Congress from determining to distribute that money to persons associated with existing, federally-recognized Delaware tribal entities. See *Northern Cheyenne Tribe v. Hollowbreast*, No. 75-145, decided May 19, 1976, slip op. 7.

4. In sum, the decision of the district court in this case is an unprecedented restriction on the broad power of Congress to allocate tribal property. The thrust of appellees' assertions is that Congress could and should have included them in the distribution authorized by 25 U.S.C. (Supp. IV) 1292. They have failed to demonstrate, however, why Congress' contrary determination, in an area marked by such wide legislative discretion, is unconstitutional. Plenary review of this case is necessary to resolve this important question.

#### CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,  
*Solicitor General.*

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**BRIEF FOR THE SECRETARY OF THE INTERIOR**

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**ROBERT H. BORK,**  
*Solicitor General,*

**PETER R. TAFT,**  
*Assistant Attorney General,*

**A. RAYMOND RANDOLPH, JR.,**  
*Deputy Solicitor General,*

**KENNETH S. GELLER,**  
*Assistant to the Solicitor General,*

**EDMUND B. CLARK,  
EDWARD J. SHAWAKER,**  
*Attorneys,  
Department of Justice,  
Washington, D.C. 20530.*

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**OPINION BELOW**

The opinion of the three-judge district court (J.S. App. 1a-87a)<sup>1</sup> is reported at 406 F. Supp. 1309.

**JURISDICTION**

The judgment of the three-judge district court was entered on December 18, 1975 (J.S. App. 88a-89a).

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<sup>1</sup> "J.S. App." references are to the appendix to the Jurisdictional Statement of Appellants Delaware Tribal Business Committee, *et al.*, in No. 75-1301.

A notice of appeal was filed on January 16, 1976. On March 4, 1976, Mr. Justice White extended the time for docketing the appeal to and including April 15, 1976, and the jurisdictional statement was filed on that date. The Court noted probable jurisdiction on June 14, 1976, and consolidated the case with Nos. 75-1301 and 75-1335 (A. 107). The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253.

### **QUESTION PRESENTED**

Whether 25 U.S.C. (Supp. IV) 1291-1297, which authorizes the payment of funds to members of two federally-recognized tribes of Delaware Indians (and which defines that membership for purposes of the payment) pursuant to a judgment of the Indian Claims Commission, denies due process of law under the Fifth Amendment by excluding descendants of Delaware Indians who severed their relations from the tribe more than a century ago.

### **CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED**

The Constitution of the United States provides in pertinent part:

Article I, Section 8:

The Congress shall have Power \* \* \*

\* \* \* \*

To regulate Commerce \* \* \* with the Indian Tribes.

**Fifth Amendment:**

No person shall be \* \* \* deprived of \* \* \*  
property, without due process of law \* \* \*.

The Act of October 3, 1972, 86 Stat. 762 *et seq.*,  
25 U.S.C. (Supp. IV) 1291-1297, is set forth at J.S.  
App. 94a-97a.

**STATEMENT**

1. The Delaware Indians originally lived on the east coast of what is now the United States but, by the second decade of the 19th century, they were geographically scattered.<sup>2</sup> Although the main branch of the tribe lived in Indiana and Ohio, some members (the Munsee Indians) resided in New York and Canada, while others lived on a tract of land in Missouri that had been granted by Spain in 1793, and still others were located in Texas, Arkansas, and Oklahoma. In the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana to the United States in return for a promise of land west of the Mississippi River. The Delawares then moved to the Missouri tract, where they remained until 1829 (J.S. App. 6a-7a).

In September 1829, the Delawares signed another treaty with the United States, supplementing the 1818 Treaty, in which they agreed to give up their tem-

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<sup>2</sup> A more extensive discussion of the historical facts outlined in this statement may be found in S. Rep. No. 1518, 90th Cong., 2d Sess. 7-11 (1968), and the opinion of the Court of Claims in *Delaware Tribe of Indians v. United States*, 128 F. Supp. 391 (Ct. Cl.).

porary residence in Missouri and to move to a permanent residence in Kansas. 7 Stat. 327. These Kansas lands purported to satisfy the federal government's obligation under the 1818 Treaty to provide the Delawares with a home west of the Mississippi. Although most of the Delawares moved to the land assigned them in Kansas, a substantial group (the Absentee Delawares) settled in Oklahoma, where they have maintained their tribal identity, with chiefs and a tribal council, to the present day (J.S. App. 7a-8a). The Absentee Delawares constitute a federally-recognized tribe.<sup>3</sup>

In 1854, the nucleus of the Delaware Tribe, then living in Kansas, entered into a treaty with the United States in which it ceded most of its lands to the federal government (10 Stat. 1048; J.S. App. 98a-106a). Part of this territory was reserved for the Delawares as a permanent home (the "diminished reserve"), while the bulk of the remainder (the "trust lands") was to be sold by the government at public auction with the proceeds going to the Delaware general tribal fund. In 1856 and 1857, however, the United States violated the terms of the treaty by selling the trust lands, not by public auction, but by private sales at appraised prices. As a result, the Delawares received \$1,057,898.19, which was far less than they would have obtained had a public auction been held (J.S. App. 8a; 21 Ind. Cl. Comm. 344, 366).

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<sup>3</sup> The Absentee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1335, which has been consolidated with this appeal.

In 1866, the Delawares entered into another treaty with the United States in which they agreed to move to Indian Country in Oklahoma (14 Stat. 793; J.S. App. 107a-118a). Under this treaty, the diminished reserve was to be sold and the proceeds used to buy 160-acre tracts of land in Oklahoma for each tribal member. In addition, all adult Delawares were to be given the opportunity either to remove to Oklahoma with the tribe or, instead, to dissolve all tribal relations and to become citizens of the United States. Each Delaware who chose to leave the tribe was to receive fee simple title to an 80-acre plot in the reserved Kansas lands and a *pro rata* portion of the tribal assets "then held in trust by the United States" (J.S. App. 9a, 76a). Article IX of the treaty further provided that Indians electing to become citizens of the United States "shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities" (14 Stat. 796; J.S. App. 77a).

Appellees, who sued as representatives of the so-called "Kansas 'Delawares,'" are the descendants of those Indians who severed all relations with the Delaware Tribe in 1866, to receive their proportionate share of the tribal assets, and to remain in Kansas as American citizens (J.S. App. 9a-10a).<sup>4</sup>

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<sup>4</sup> A total of 21 adults and 49 minors remained in Kansas. Under Article IX of the 1866 Treaty, the minor children of the Kansas "Delawares" were to be considered temporarily severed from the tribe until they became 21 years' old, at which point they could elect either to become citizens of the United States or to rejoin the tribe in Oklahoma. By Act of

By 1867 most of the Delawares had moved to Oklahoma. Pursuant to an agreement with the Cherokee Tribe, each Delaware who enrolled upon a certain register received a life estate of 160 acres of land on the Cherokee reservation. See generally *Delaware Indians v. Cherokee Nation*, 193 U.S. 127. Although these Indians became members and citizens of the Cherokee Nation, they retained a group identity as Delawares (J.S. App. 10a-11a & n. 12). Their descendants are the Cherokee Delawares, a federally-recognized tribe.<sup>5</sup>

2. In 1951, members of the Absentee Delaware Tribe filed suit in the Indian Claims Commission on behalf of the Delaware Nation to challenge as inadequate the compensation received under the 1818 Treaty. In 1963, the Commission found that the value of the Indiana lands ceded to the United States in 1818 was greatly in excess of the value of the Kansas lands received by the Delawares in return in 1829, and awarded \$1,627,244.64 to the Delaware Nation (J.S. App. 12a). 12 Ind. Cl. Comm. 404. Five years later, in the Act of September 21, 1968, 82 Stat. 861

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June 22, 1874, 18 Stat. 146, 175, however, Congress declared the minors to be citizens of the United States, appropriated funds to pay them a proportionate share of the assets of the Delaware Tribe, and directed the Secretary of the Interior to issue fee simple title to lands allotted to them in the 1866 Treaty (J.S. App. 11a-12a).

<sup>5</sup> The Cherokee Delawares, defendants below, have sought review of the judgment of the district court in No. 75-1301, which has been consolidated with this appeal. The formal name of this tribe is the "Delaware Tribe of Indians."

*et seq.*, 25 U.S.C. 1181-1186, Congress ordered the Secretary of the Interior to distribute funds previously appropriated to satisfy the judgment to the following (25 U.S.C. 1181; J.S. App. 92a):

(a) Indians whose "name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906";<sup>[6]</sup>

(b) Indians whose "name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior";<sup>[7]</sup> or

(c) Indians who "are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary."

Thus, the Cherokee Delawares (through the first provision), the Absentee Delawares (through the second provision), and the Kansas "Delawares" (through

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<sup>6</sup> The 1906 payroll was compiled for the purpose of distributing \$150,000 appropriated by Congress in settlement of a number of lawsuits brought by the Cherokee Delawares against the United States. See Act of April 21, 1904, 33 Stat. 189, 222. (J.S. App. 14a, n. 15.)

<sup>7</sup> The 1940 census roll is used by the Absentee Delawares as the basis for determining tribal membership pursuant to a 1956 resolution of the Absentee Delaware Tribe (J.S. App. 14a, n. 15).

the third, or "catchall," provision) were eligible to participate in this distribution.

In 1950 and 1951, the Absentee and Cherokee Delawares also brought separate but identical suits in the Indian Claims Commission for an accounting under the 1854 Treaty relating to the sale of the "trust lands" in 1856 and 1857. After determining that both groups were entitled jointly to represent the Delaware Tribe, the Commission concluded that the "trust lands" had not been sold at public auction, contrary to the terms of the treaty, and that the Delawares received \$1,385,617.81 less than they were entitled to for the land; accordingly, the Commission awarded the Delawares \$9,168,171.13, which included interest from 1857 to 1969. 21 Ind. Cl. Comm. 344, 366-369. Three years later, in the Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, Congress adopted a distribution plan for payment of this judgment that differed from the distribution set forth in 25 U.S.C. 1181-1186: ten percent of the award was to be paid directly to the Cherokee and Absentee Delaware Tribes for uses approved by the Secretary of the Interior, while the remaining ninety percent was to be divided among individuals in categories (a) and (b) above. See 25 U.S.C. (Supp. IV) 1292. Thus, since the "catchall" provision (c) was not included in this distribution statute, the Kansas "Delawares" were not permitted to share in the second award (J.S. App. 15a-17a).

By March 1974, the Bureau of Indian Affairs had approved 9,573 Indians to share in the \$9,168,171.13

award. Of these, 7,765 were Cherokee Delawares and 1,808 were Absentee Delawares (J.S. 39a, n. 36).<sup>8</sup>

3. On August 28, 1973, Wanda June Weeks, on behalf of herself and the Kansas "Delawares,"<sup>9</sup> instituted an action in the United States District Court for the Western District of Oklahoma against the Secretary of the Interior and the Cherokee and Absentee Delawares to challenge the constitutionality of the distribution statutes, 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297 (App. 6-16, 21-25). Her amended complaint alleged that 25 U.S.C. (Supp. IV) 1292 violated the Due Process Clause of the Fifth Amendment by excluding the Kansas "Delawares" from sharing in the moneys appropriated to satisfy the second Indian Claims Commission judgment. She also challenged the inclusion of the Cherokee and Absentee Delawares in the distribution provisions of 25 U.S.C. (Supp. IV) 1291-1297.

On September 20, 1973, Dorothy Frazier and Ruth Rattler brought a similar action against the Secretary of the Interior<sup>10</sup> in the United States District Court for the Northern District of Oklahoma on behalf of the descendants of a certain member of the Delaware Tribe in 1854, who were not eligible to take under the

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<sup>8</sup> The Secretary's regulations concerning this distribution are contained in 25 C.F.R. Part 43j.

<sup>9</sup> Plaintiff Weeks informed the court that she had identified 678 living descendants of the Indians who left the tribe in 1866 (J.S. App. 3a-4a, n. 3).

<sup>10</sup> The Cherokee Delawares and Absentee Delaware Tribes later intervened in this action as defendants.

1906 or 1940 rolls. The complaint sought the inclusion of the plaintiff class in the distribution under 25 U.S.C. (Supp. IV) 1291-1297 or a declaration of that statute's unconstitutionality as a denial of equal protection of the law.

On April 22, 1974, the actions were consolidated in the Western District of Oklahoma<sup>11</sup> and a three-judge district court was convened under 28 U.S.C. 2282.<sup>12</sup> The court, with one judge dissenting, agreed with the plaintiffs that 25 U.S.C. (Supp. IV) 1291-1297 violated due process by arbitrarily deleting the Kansas "Delawares," whose ancestors were among the Indians injured by the government's breach of the 1854 Treaty, from the class of persons entitled to share in the second distribution. Although the court majority conceded that the challenged statute involved no "suspect classification" or "fundamental interest," it concluded that the exclusion of the Kansas "Delawares" from the distribution provisions had no rational basis (J.S. App. 29a, 35a-51a). Therefore, the court declared the statute unconstitutional and enjoined the Secretary from distributing the funds appropriated thereunder. The court rejected the attack

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<sup>11</sup> One month earlier that court had issued a preliminary injunction preventing the Secretary from distributing any funds under the challenged statutes (App. 2).

<sup>12</sup> On August 2, 1974, the parties in the *Frazier-Rattler* case agreed to rely on and adopt the arguments made in the *Weeks* case.

on 25 U.S.C. 1181-1186 and denied all other relief requested by the appellees (J.S. App. 64a).<sup>13</sup>

### INTRODUCTION AND SUMMARY OF ARGUMENT

Few subjects addressed by this Court have received such long-standing and consistent recognition as the plenary power of Congress over the property of Indian tribes. More than a half-century ago, Mr. Justice Brandeis wrote for a unanimous Court that, "as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare." *Morrison v. Work*, 266 U.S. 481, 485. Equally well-settled is that whatever title Indians have in tribal property is in the tribe, and not in its individual members, *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307, and that the federal government may determine membership in the tribe for the purpose of adjusting rights in tribal property. *Sizemore v. Brady*, 235 U.S. 441, 447; *Stephens v. Cherokee Nation*, 174 U.S. 445, 488.

The issue presented by this case is whether Congress exceeded these broad powers and violated the Due Process Clause of the Fifth Amendment by distributing tribal property of the Delaware Indians—specifically, funds appropriated to satisfy an Indian Claims Commission judgment that the government

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<sup>13</sup> The Kansas "Delawares" have sought review of this portion of the district court's judgment in No. 75-1328.

had breached an 1854 treaty with the tribe—to members of the two modern successors of the tribe, while excluding from the distribution descendants of Delaware Indians who severed their relations from the tribe more than a century ago. The district court's conclusions that the distribution statute effected an unconstitutional discrimination can be sustained only by departing from the heretofore unquestioned principles outlined above.

By rejecting the decision of Congress to distribute the judgment of the Indian Claims Commission to tribal members, and by interpreting the Due Process Clause to require, in essence, a *per capita* distribution of the judgment to all lineal descendants of members of the Delaware Tribe at the time of the alleged wrong, the decision of the district court deprives Congress of its discretion to determine the most beneficial method of allocating tribal property; it calls into question the validity of similar federal legislation; and it threatens to impose a severe administrative burden on the Secretary.

To the extent the Due Process Clause reflects equal protection principles (see *Schlesinger v. Ballard*, 419 U.S. 498, 500, n. 3) it prevents Congress only from making distinctions that are "patently arbitrary" and "utterly lacking in rational justification." *Weinberger v. Salfi*, 422 U.S. 749, 768, quoting from *Flemming v. Nestor*, 363 U.S. 603, 611. See also *Perrin v. United States*, 232 U.S. 478, 486.

The most apparent rational basis for the statute at issue lies in the fact that those excluded—the Kansas

"Delawares"—are descendants of Indians who severed their relationship with the tribe a century ago, became citizens, and by treaty agreed they had no further rights to any tribal property. That in itself justified Congress' decision not to make them eligible for the tribal property involved here—the funds appropriated to satisfy the Commission's 1969 judgment.

Moreover, in view of the historic relationship between the federal government and the Indian tribes and the fact that tribal rather than individual property was being distributed, Congress' determination to favor tribal Indians in the allocation of tribal funds has a rational basis that is readily apparent. Indeed, similar legislative distinctions have repeatedly been upheld by this Court; indeed, as the Court recognized in *Morton v. Mancari*, 417 U.S. 535, 552, literally every piece of legislation dealing with Indian tribes singles out tribal Indians for special treatment.

### ARGUMENT

#### **25 U.S.C. (Supp. IV) 1291-1297 Is A Proper Exercise Of Congress' Constitutional Power Over Indian Tribal Property**

##### ***A. Congress Has Plenary Power Under The Constitution To Manage And Distribute The Property And Funds Of Indian Tribes***

The statute at issue, 25 U.S.C. (Supp. IV) 1291-1297, is a statute that prescribes how tribal property, not individually owned property, shall be distributed. The property resulted from the claim prosecuted in

the Indian Claims Commission for nearly twenty years by the Cherokee Delawares and the Absentee Delawares, who jointly represented the Delaware Tribe of Indians. 21 Ind. Cl. Comm. 344, 345. The claim related to the sale of tribal land under a treaty. The tribal entity owned this claim to the extent it was subject to ownership by anyone.<sup>14</sup> The United States entered into treaties with Indian tribes, not with individual tribal members, and the promises it made in those treaties were promises to the tribes. *The Sac and Fox Indians*, 220 U.S. 481, 484.

In this case, after the Commission rendered its decision against the United States in 1969 (21 Ind. Cl. Comm. at 369-370), Congress appropriated the money needed to satisfy the judgment, although it was under no legally-enforceable obligation to do so.<sup>15</sup>

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<sup>14</sup> See the opinion of the district court (J.S. App. 40a), quoting *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F. 2d 935, 954 (Ct.Cl.) ("the ancestral group 'owns' the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity").

<sup>15</sup> Congress was under no obligation to establish the Indian Claims Commission. See *United States v. Tillamooks*, 329 U.S. 40, 54-55 (Black, J., concurring).

The report of the Commission, when filed with Congress, has the same effect as a final judgment of the Court of Claims. 25 U.S.C. 70u. See also the Conference Report on the bill that became the Indian Claims Commission Act, 60 Stat. 1049 *et seq.* (25 U.S.C. 70-70v), H.R. Rep. No. 2693, 79th Cong., 2d Sess. 8 (1946).

Congress has discretion to decide whether to pay such judgments; usually it decides to do so. *Glidden Company v. Zdanok*, 370 U.S. 530, 570 (opinion of Harlan, J.). Congress' "decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government." *United States v. Realty*

The funds appropriated to satisfy the judgment of the Indian Claims Commission also constituted tribal property in which no individual had vested rights, and the district court did not hold otherwise (J.S. App. 40a, 49a). It was the Delaware Tribe that suffered from the government's breach of the 1854 Treaty, and it was the tribal entity that the judgment of the Indian Claims Commission and the monies appropriated by Congress were designed to compensate.<sup>16</sup>

Once the Commission and the courts determined the extent of the wrong and the identity of the injured tribal body, the precise terms of distribution of the award, including the specific tribal entities or individuals entitled to share in the tribal fund, were matters within the exclusive province of Congress. The Court of Claims recently stated the guiding proposition in *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F. 2d 935, 951 (citations omitted) :

The [Indian Claims] Commission must determine which identifiable group of Indians was wronged. In so doing, it must allow all interested parties to participate. \* \* \* But when it comes to frame an award, it must not overstep its proper function by the way in which it denominates the wronged entity. Certain questions,

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*Company*, 163 U.S. 427, 444. See generally Schwartz and Jacoby, *Government Litigation* 160-164 (1963).

<sup>16</sup> Indeed, the Indian Claims Commission is empowered only to adjudicate claims held by tribal entities rather than by individual Indians. 25 U.S.C. 70a, 70i. See *Minnesota Chippewa Tribe v. United States*, 315 F. 2d 906, 914 (Ct. Cl.).

such as "whether specific individuals, classes of persons, or subgroups saying that they are members or components of the prevailing group are entitled to participate in the judgment," \* \* \* are for Congress or authorized administrative bodies, and not for resolution by the Commission or by this court.

See also *Cherokee Freedmen*, 195 Ct. Cl. 39, 46 & n. 4, 51-52; *Snoqualmie Tribe of Indians v. United States*, 372 F. 2d 951, 957 (Ct. Cl.); *Red Lake & Pembina Bands v. Turtle Mt. Band of Chippewa Ind.*, 355 F. 2d 936, 943-944 (Ct. Cl.); *Minnesota Chippewa Tribe v. United States*, *supra*, 315 F. 2d at 913-914 & n. 11; see also *McCalib, Admr. v. United States*, 83 Ct. Cl. 79, 85.

In directing the distribution of this tribal property pursuant to the statute attacked by the Kansas "Delawares," Congress exercised its traditionally broad authority over the management and distribution of lands and property held by recognized Indian tribes, an authority derived from Congress' express constitutional power "[t]o regulate Commerce \* \* \* with the Indian Tribes" (Article I, Section 8).<sup>17</sup> This control by Congress of tribal assets has been termed "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs \* \* \*," Cohen, *Handbook of Federal Indian Law* 94 (1942), and the contention

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<sup>17</sup> The treaty-making power (Article II, Section 2, cl. 2) is also a source of federal authority over Indian matters. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 n. 7; *Worcester v. Georgia*, 6 Pet. 515, 559 (Marshall, C.J.).

that Congress may have exceeded its constitutional powers in dealing with tribal assets "is one that has often been made in this court and rejected as often as made." *Chase, Jr. v. United States*, 256 U.S. 1, 7. See also *Bryan v. Itasca County*, No. 75-5027, decided June 14, 1976, slip op. 2, n. 2; *Board of Commissioners v. Seber*, 318 U.S. 705, 715-718; *Winton v. Amos*, 255 U.S. 373, 391; *Williams v. Johnson*, 239 U.S. 414, 420; *Sizemore v. Brady*, *supra*, 235 U.S. at 449; *Tiger v. Western Investment Co.*, 221 U.S. 286, 311.

Embraced within this pervasive congressional authority over tribal property is the power to allocate tribal assets in the manner perceived by Congress to be most beneficial to the affected tribe and to realize most effectively the other goals of the historic guardian-ward relationship. In *Sizemore v. Brady*, *supra*, for example, the Court, in sweeping language whose validity has never been doubted, upheld the congressional determination to amend acts granting allotments of tribal lands and money to individual Indians, stating (235 U.S. at 449) :

The lands and funds to which [the allotment statute] related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians.

And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living.

The Court has never departed from the principle, recognized in *Sizemore*, that it is for Congress to determine what is the most beneficial manner of dealing with tribal property. Thus, Congress may choose to differentiate between groups of Indians in the same tribe in making a distribution, *Simmons v. Eagle Seelatsee*, 384 U.S. 209, affirming 244 F. Supp. 808 (E.D. Wash.), to expand a class of tribal beneficiaries entitled to share in royalties from tribal lands, *United States v. Jim*, 409 U.S. 80; *Gritts v. Fisher*, 224 U.S. 640, 648, or to devote to tribal use mineral rights under allotments that otherwise would have gone to individual allottees, *Northern Cheyenne Tribe v. Hollowbreast*, No. 75-145, decided May 19, 1976. Furthermore, Congress has authority, which it has exercised on occasion, to determine membership in an Indian tribe for purposes of distributing tribal property. Cohen, *Handbook of Federal Indian Law*, *supra*, at 98. See *Stephens v. Cherokee Nation*, 174 U.S. 445, 488; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307.

Because title to tribal property and funds rests solely in the tribe rather than in its individual members and because tribal members have no vested interest in tribal assets that may not be abrogated or impaired by Congress acting in its guardianship

status,<sup>18</sup> the courts consistently have granted wide latitude to Congress in deciding what is the best or most efficient use to which tribal lands or funds should be devoted. Indeed, we know of no instance in which the Court has failed to sustain a legislative determination regarding the use of tribal property for the benefit of the tribe.

This is not because Congress' judgment on these matters has always been correct, nor is it because the judiciary has always agreed with the congressional determination. As we have discussed, "the plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-552. Thus, once a court finds that the legislation "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *id.* at 555, the judicial inquiry is at an end.<sup>19</sup>

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<sup>18</sup> See, e.g., *Stephens v. Cherokee Nation*, *supra*, 174 U.S. at 488: "The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

<sup>19</sup> This obviously does not mean that all federal legislation concerning Indians is therefore immune from judicial scrutiny or that claims, such as those presented by respondents, are not justiciable. Congress has plenary authority to legislate with respect to tribal property but such power does "not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.'" *United States v. Creek Nation*, 295 U.S. 103, 110; see also *United States v. Tillamooks*, *supra*, 329

To go further not only is to ignore two centuries of precedent but also is to invade an area reserved under the Constitution to Congress.<sup>20</sup> This we submit is what the district court majority did.

Although the district court acknowledged that the Kansas "Delawares" had severed their relations with the tribe and become fully emancipated American citizens in 1866, it thought that this was insufficient to justify Congress' failure to allow them to share in the award because Article IX of the Treaty of 1866 "expressly provided that any Delaware electing to become a citizen would receive \* \* \* his 'just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States' " (J.S. App. 45a). In the court's view, participation in the distribution by the Kansas "Delawares" was therefore mandatory: "[h]ad the United States fulfilled its obligations in good faith under the 1854 Treaty, the Kansas Delawares on electing citizenship would each have received their just proportion of the increased proceeds of the land sales in 1856 and 1857" and the Indian Claims

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U.S. at 54; Cohen, *Handbook of Federal Indian Law*, *supra*, at 96; cf. *United States v. Jim*, *supra*, 409 U.S. at 82 n.3.

<sup>20</sup> Moreover, Article 8 of the 1854 Treaty provides (J.S. App. 102a):

Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said [trust] lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

Commission award "was clearly intended to redress the injury and diminution of proceeds from those sales" (*ibid.*).

This holding misperceives the purpose of an Indian Claims Commission judgment, which is not to "make whole" any individual tribal member or group of Indians, but rather to correct an unconscionable injustice to the historic tribe. The *legal* questions whether and to what extent an Indian tribe has been wronged by the federal government—questions that are within the expertise of the Indian Claims Commission and the courts—are wholly distinct from the legislative *policy* decision of how best to apportion the tribal award among the competing interests. By ruling that the Due Process Clause deprived Congress of any discretion to exclude the Kansas "Delawares" from participation in the award because, in some quasi common-law contract sense, that group stands on an "equal footing" (J.S. App. 29a) with the Cherokee and Absentee Delawares, the court below has resurrected the concept of "vested rights" of individual Indians in tribal property—a concept that has consistently been rejected by this Court (*e.g.*, *United States v. Jim*, 403 U.S. 80)—and in essence has abrogated the statutory requirement that claims under the Indian Claims Commission Act be presented on behalf of the tribal entity rather than by individuals. See p. 15 n. 16, *supra*.<sup>21</sup>

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<sup>21</sup> If the federal government had honored its obligations under the 1854 Treaty by selling the trust lands at public auction, additional revenues doubtless would have accrued to

The logical extension of the constitutional stricture imposed by the district court is the requirement, as a matter of due process, that judgment funds be distributed *per capita* to *all* lineal descendants of members of an Indian tribe at the time of the alleged wrong.<sup>22</sup> Such a rule would render meaningless the repeated judicial pronouncement that the questions "whether specific individuals, classes of people, or subgroups saying that they are members or components of the prevailing group are entitled to participate in [an Indian Claims Commission] judgment \* \* \* are reserved for Congress or for author-

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the tribe, but that revenue would have been tribal property to which no individual rights would have attached until it had been distributed. *United States v. Jim*, *supra*, 409 U.S. at 82-83; *United States v. Rowell*, 243 U.S. 464, 468-469. Whether or not the ancestors of the Kansas "Delawares" might have received a larger proportionate distribution when they severed relations with the tribe, they certainly obtained no rights enforceable a century later.

<sup>22</sup> At least the district court appeared to assume that such a *per capita* distribution to each lineal descendant would result in the due process it found lacking in the present statute (J.S. App. 49a-50a). One might ask, however, whether the absolute equality the court thought necessary would be achieved by such a statute. Would it not be "more equal" to distribute to the descendants of the Kansas "Delawares" only that percentage of the award equal to the proportion of the tribe represented by their ancestors in 1866 when they left—a sort of *per stirpes* distribution analogous to the method of dividing an intestate estate? One might also ask whether 1866 is the proper year to focus upon or whether it should be when the wrong occurred (in this case 1856 and 1857). Until the decision below, these have been questions for Congress alone to decide.

ized administrative resolution when the award is paid." *Cherokee Freedmen*, *supra*, 195 Ct. Cl. at 46. Moreover, it would impose a massive and unyielding administrative burden on the Secretary to undertake individualized adjudications of descendency from tribal members in the distant past. Still further, such a rule would raise serious questions concerning the validity of a host of past and present distribution statutes that have authorized payments to Indians who are either on, or descended from persons on, specified tribal rolls, without providing express "catch-all" coverage for all descendants of members of the tribe on the exact date of injury.<sup>23</sup>

***B. The Statute Distributing Delaware Indian Tribal Funds To The Modern Successors Of That Tribe And To Their Members Does Not Violate The Due Process Clause***<sup>24</sup>

While we believe the foregoing demonstrates the constitutionality of 25 U.S.C. (Supp. IV) 1291-1297,

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<sup>23</sup> Congress has distributed judgment funds to enrolled members of the modern tribe, or to members eligible for enrollment in the tribe, in the following statutes: 25 U.S.C. 565-565(g) (Klamaths); 25 U.S.C. (Supp. IV) 581-590c (Shoshone); 25 U.S.C. (1970 ed. and Supp. IV) 1071-1073 (Confederated Colville); 25 U.S.C. (1970 ed. and Supp. IV) 1161-1163 (Cheyenne-Arapaho); 25 U.S.C. 1191-1195 (Confederated Umatilla); 25 U.S.C. (Supp. IV) 1261-1265 (Blackfeet and Gros Ventre); 25 U.S.C. (Supp. IV) 1300b-1300b-5 (Kickapoo); 25 U.S.C. (Supp. IV) 1300c-1300c-5 (Yankton Sioux); 25 U.S.C. (Supp. IV) 1300e-1300e-7 (Assiniboine Tribes of Montana).

<sup>24</sup> In the Court's order noting probable jurisdiction in No. 75-1335, the parties were requested to discuss whether the

the statute in any event satisfies the requirements of the Due Process Clause even if it is analyzed without regard to Congress' plenary authority over tribal property. In light of its historic relationship with federally-recognized Indian tribes, Congress clearly was justified in favoring the Cherokee and Absentee Delaware tribes in the allocation of tribal assets over the descendants of Delaware Indians who ended their tribal membership and took their proportionate share of tribal property more than a century ago.

Distinctions drawn by Congress that do not implicate fundamental constitutional interests or rest upon

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tribal entities involved in this case are indispensable parties, in whose absence the suit should have been dismissed. The doctrine that Indian tribes may not be sued without their consent or the consent of Congress is firmly established. *United States v. U.S. Fidelity Co.*, 309 U.S. 506, 512; *Turner v. United States*, 248 U.S. 354, 358. Equally well settled is that this principle of quasi-sovereign immunity may not be evaded by bringing suit against tribal officers as representatives of the tribe (see, e.g., *Seneca Constitutional Rights Organization v. George*, 348 F. Supp. 48, 50 (W.D.N.Y.); *Barnes v. United States*, 205 F. Supp. 97, 100 (D. Mont.)) or against the Secretary of the Interior as guardian of the tribe or trustee of its assets (see, e.g., *Tewa Tesuque v. Morton*, 498 F. 2d 240 (C.A. 10), certiorari denied, 420 U.S. 962; *Lomayaktewa v. Hathaway*, 520 F. 2d 1324 (C.A. 9), certiorari denied *sub nom. Susenkewa v. Kleppe*, No. 75-844, March 29, 1976).

Whether an Indian tribe has been joined in disregard of these principles or has not been made a party in violation of Rule 19, Fed.R.Civ.P., are questions that, in our view, are not presented here, since the Absentee and Cherokee Delawares voluntarily intervened in *Frazier, et al. v. Morton*, W.D. Okla., Civ. 74-368-D, one of the consolidated cases presently under review. See pp. 9-10 and n.10, *supra*.

suspect classifications do not violate principles of equal protection embodied in the Due Process Clause unless they are "patently arbitrary," "utterly lacking in rational justification." *Weinberger v. Salfi*, 422 U.S. 749, 768, quoting from *Flemming v. Nestor*, 363 U.S. 603, 611. See also *Mathews v. Lucas*, No. 75-88, decided June 29, 1976; *Richardson v. Belcher*, 404 U.S. 78, 81-84. The statute in issue should be sustained under that test.

1. There is a quite "rational justification" for Congress' failure to make the Kansas "Delawares" eligible to receive the funds appropriated to satisfy the judgment in favor of the Delaware Tribe. The Kansas "Delawares," as a class, do not claim to be members of that tribe or any other. Pursuant to the 1866 Treaty,<sup>25</sup> they severed their relationship with the tribe and became United States citizens. Article IX of that Treaty, which is set forth in the margin,<sup>26</sup> provides that "such persons"—that is, appellees' ancestors—"shall cease to be members of the Delaware

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<sup>25</sup> 14 Stat. 793.

<sup>26</sup> The last sentence of Article IX provides:

There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

tribe, and shall not further participate in their councils, nor share in their property or annuities." On this ground alone, Congress had a rational basis for excluding the Kansas "Delawares": the funds appropriated to satisfy the judgment of the Indian Claims Commission are tribal funds (see pp. 13-15, *supra*) and the Kansas "Delawares," their ancestors having left the tribe, were not entitled to share in them.

The district court, however, thought that Article IX should not be interpreted to mean that the Kansas "Delawares" had no "rights to share in such a future award as is involved here" (J.S. App. 45a). In support, the court quoted the following passage from *Choate v. Trapp*, 224 U.S. 665, 675: "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

Far from supporting the court's view, this venerable rule of construction is firmly against the court's interpretation. While the rule is that doubtful expressions are not to be "resolved in favor of the United States," this has little relevance here: excluding the Kansas "Delawares" from sharing in the award does not affect the total amount appropriated by Congress; including them would not require Congress to appropriate more money. The question here deals not with the size of the award but how it should be divided. More important is the rule's admonition that doubtful expressions are to be resolved in favor

of those who "are wards of the nation." That means the interpretation should be in favor of the Absentee Delaware tribe and the Cherokee Delaware tribe,<sup>27</sup> not the Kansas "Delawares," whose ancestors ceased being wards of the Nation more than a century ago when they left the tribe.<sup>28</sup> See *Eastern Band of Cherokee Indians v. United States*, 117 U.S. 288, 311-312.

The statute at issue is thus rationally justified for the quite apparent reason that, in distributing tribal funds that Congress created by appropriation to satisfy a 1969 judgment, it simply excludes those whose ancestors relinquished any interest in tribal property.<sup>29</sup>

Moreover, it is significant that the exclusion of the Kansas "Delawares" from the distribution authorized by 25 U.S.C. (Supp. IV) 1291-1297, was not without precedent. On April 21, 1904, Congress ap-

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<sup>27</sup> See note 32, *infra*.

<sup>28</sup> Cf. *Northern Cheyenne Tribe v. Hollowbreast*, No. 75-145, decided May 19, 1976, slip op. 6-7 n. 7 ("The court also relied on the canon that 'statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor.' \* \* \* But this eminently sound and vital canon has no application here; the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members.").

<sup>29</sup> Appellees, citing the Act of March 3, 1875, 18 Stat. 410, 420, 43 U.S.C. 189, argue that any rights given up when their ancestors left the tribe have been restored (Motion to Dismiss in No. 75-1301, at p. 7). But the statute cited applies to Indians who gave up their tribal relations to settle under federal homestead laws, which appellees' ancestors did not (Cohen, *Handbook of Federal Indian Law*, *supra*, at 186); and, in any event, it conferred no rights upon the descendants of such Indians. *Oakes v. United States*, 172 Fed. 305, 309-310 (C.A. 8); cf. *Halbert v. United States*, 283 U.S. 753, 762-763.

propriated \$150,000 to settle various claims against the United States by the "Delaware Tribe of Indians," including the so-called "outlet" lands that had been ceded to the federal government under the 1854 Treaty. See *United States v. Delaware Tribe of Indians*, 427 F. 2d 1218, 1229-1230 (Ct. Cl.). The appropriations act directed the Secretary of the Treasury to pay the settlement fund to the Delaware Tribe, "as said tribe shall in council direct" (33 Stat. 189, 222). Then, as now, some of the Kansas "Delawares" sought to participate in the distribution, but were excluded, as the district court acknowledged (J.S. App. 14a, n. 15), "on grounds similar to some of those argued in the present case." See Resolution of the Delaware Council, April 29, 1904 (A. 90-95); Letter to the Secretary of the Interior from the Delaware Indians, January 25, 1905 (A. 96-97); and Letter to the U.S. Indian Agent from the Commissioner of Indian Affairs, March 22, 1905 (A. 98-100). Indeed, after surveying the historical evidence the Comptroller of the Treasury concluded that "[m]anifestly [the Kansas "Delawares"] were not entitled to participate in the distribution of annuities or other funds due or belonging to the Delaware tribe," and observed (11 Decisions of the Comptroller of the Treasury 496, 500, emphasis in original):

The provision in the act of April 21, 1904, *supra*, authorizes and directs payment to the "Delaware *tribe* of Indians residing in the Cherokee Nation, as said *tribe* shall in council direct," in the sum of \$150,000 in full [sic] of all claims and demands of "said tribe" against the United

States. The proviso immediately following the appropriation in the act emphasizes the clear indication that the appropriation was made for the tribe as distinguished from the Delaware Indians who had severed their tribal relations and become citizens of the United States.

2. Even aside from this provision in the 1866 Treaty, by allocating ten percent of the funds appropriated to pay the judgment of the Indian Claims Commission to the Cherokee and Absentee Delaware tribal entities for tribal purposes (25 U.S.C. (Supp. IV) 1294), while distributing the remaining ninety percent to the persons whose names, or the names of whose lineal ancestors, appear on designated tribal rolls (25 U.S.C. (Supp. IV) 1292), Congress rationally acted to further the legitimate legislative objective of mitigating the hardship to Indians who belong to federally-recognized tribes. No extensive discussion is required to demonstrate the wisdom of that result. Laws granting preferences to tribes and tribal Indians, including the award of benefits to tribal entities and their members that are not made available to persons who may ethnically be of Indian blood but who are not a part of a federally-recognized tribe, have long been sustained by this Court as a proper exercise of the constitutional power of Congress "[t]o regulate Commerce \* \* \* with the Indian tribes." This Court and Congress have recognized time and again that in depriving the Indian tribes of most of their land and of their traditional ways of supporting themselves, the federal government assumed spe-

cial responsibilities toward them—responsibilities that have correctly been described from virtually the beginning of our Nation as resembling the duties of a guardian to a ward. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17; *United States v. Kagama*, 118 U.S. 375, 383-384.<sup>30</sup>

In light of this and the unique history of federal relations with the Indian tribes, Congress repeatedly has favored tribal members in ways that might not be appropriate with respect to other groups. This Court has noted that literally every piece of legislation dealing with Indian tribes singles out tribal Indians for special treatment. *Morton v. Mancari*, *supra*, 417 U.S. at 552. In recent cases, for example, the Court has sustained legislation granting tribal Indians welfare benefits (*Morton v. Ruiz*, 415 U.S. 199) and hiring preferences within the Bureau of Indian Affairs (*Morton v. Mancari*, *supra*); the

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<sup>30</sup> The guardianship principle and the powers concomitant with it were set forth by the Court in *Board of Commissioners v. Seber*, 318 U.S. 705, 715, which upheld against constitutional attack a federal tax immunity granted tribal Indians on land purchased with trust funds:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

Court has indicated that other, similar statutory preferences through which Congress has sought to fulfill its obligation toward the Indians will not be disturbed. *Morton v. Mancari*, *supra*, 417 U.S. at 555; *Moe v. Salish & Kootenai Tribes*, No. 74-1656, decided April 27, 1976, slip op. 16.<sup>31</sup>

This accepted congressional power to favor tribal Indians in the dispensation of a variety of public benefits provides still further support for the rationality of the system established by Congress in 25 U.S.C. (Supp. IV) 1291-1297 for the allocation of property *belonging to the tribe*. The funds appropriated to compensate the Delaware Tribe for breach of the 1854 Treaty, as we have emphasized (see p. 15, *supra*), are tribal property and it is clear that "the right to each individual [Indian] to participate in the enjoyment of such property depend[s] upon tribal membership, and when that [is] terminated by death or otherwise the right [is] at an end." *Size-more v. Brady*, *supra*, 235 U.S. at 446-447. See also *Halbert v. United States*, 283 U.S. 753, 762-763. Thus, Indians such as the Kansas "Delawares," whose ancestors renounced their tribal membership and separated from the tribe, traditionally have not been entitled to share in the tribal assets. *Eastern Band of Cherokee Indians v. United States*, 117 U.S.

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<sup>31</sup> The Court has emphasized, however, that the preferences apply only to members of federally-recognized tribes and that the determination of who are tribal Indians for these purposes is not fixed by lines of descendancy or race (*Morton v. Mancari*, *supra*, 417 U.S. at 553 n. 24).

288; *Miami Tribe of Oklahoma v. United States*, 281 F. 2d 202, 213 (Ct. Cl.), certiorari denied, 366 U.S. 924. The distribution statute reflects this rational distinction between Indians who presently are members of federally-recognized tribes and those whose only connection with the tribe is historical.<sup>32</sup> Congress properly concluded that different treatment was warranted for each class.”<sup>33</sup>

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<sup>32</sup> Although the Kansas “Delawares” do not dispute that the Absentee Delawares are a federally-recognized tribe (see J.S. 20, No. 75-1328), they contend that the Cherokee Delawares are not federally recognized and that Congress may not prefer its members over non-tribal individuals of Indian blood (Mot. to Dismiss or Aff. 4, 7-9). But Congress has repeatedly recognized the Cherokee Delaware Tribe, both by treaty prior to the tribe’s moving to Oklahoma and by statute thereafter. See, *e.g.*, the “Resolution Establishing by-laws Under Which the Delaware Tribal Business Committee Shall Speak and Act in Behalf of the Delaware Tribe of Indians” (A. 101-106), which was adopted on September 7, 1958, by the Delaware Tribal Business Committee and was approved by the Commissioner of the Bureau of Indian Affairs on May 31, 1962 (Answer 50 to interrogatories to the Secretary of the Interior, with attachments). See also the Act of April 21, 1904, 33 Stat. 189, 222, which provided for payments to “the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct \* \* \*”; the Act of February 7, 1925, 43 Stat. 812, which permitted claims to be brought in the Court of Claims by the “Delaware Tribe of Indians residing in Oklahoma;” and the Act of March 3, 1927, 44 Stat. 1358, and the Act of June 4, 1936, 49 Stat. 1459, which amended the 1925 statute.

<sup>33</sup> The district court (J.S. App. 25a & n. 23) and the Kansas “Delawares” (Mot. to Dismiss or Aff. 13, 15; Mot. to Dismiss 5, No. 75-1301) apparently conceded that a statute distributing all, rather than merely ten percent, of the appropriated funds to the Absentee and Cherokee Delaware tribes would have

Appellees contend, however, that the Cherokee and Absentee Delawares may not be favored by federal

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raised no constitutional problems. We fail to comprehend why the alternative means of distribution employed by Congress constitute impermissible discrimination against the Kansas "Delaware" class. The result of either method of allocation would be identical: the Absentee and Cherokee Delaware tribes, and their members, would receive the full benefit of the award, while the Kansas "Delawares" would be eliminated from any share of the fund. Indeed, we can perceive no constitutional infirmity if, upon receiving the complete award, the tribes would then have voted to distribute a portion of the monies to their individual tribal members, thus achieving the same result presently mandated by 25 U.S.C. (Supp. IV) 1291-1297. See *Prairie Band of Pottawatomie Tribe of Indians v. Puckkee*, 321 F. 2d 767 (C.A. 10); *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F. 2d 364 (C.A. 10), certiorari denied, 385 U.S. 831.

Moreover, the form of the distribution statute indicates that Congress did intend to award the entire judgment to the modern successors of the Delaware Tribe, with the proviso that the tribes must in turn allocate the bulk of their portion to certain designated members. Section 1294(a) provides that "[t]he Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292 (c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title," and Section 1294 (b) similarly provides that "[t]he funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the [Cherokee Delawares] in the United States Treasury \* \* \*" (emphasis added). Compare, e.g., the distribution authorized by 25 U.S.C. 1183, which requires the judgment fund relating to the Indiana lands taken from the Delawares in 1818 to be allocated directly among the individual Indians whose names appear on the rolls prepared in accordance with Section 1181, rather than indirectly through the tribes or other entities.

legislation because they have no formal reservation (Motion to Dismiss or Aff. 7-9). But the important question is not whether some members of the tribes may live outside of a formal tribal community; it is whether the federal government has acknowledged a responsibility toward these people as a group, through recognition of their tribe. Even Indian tribes possessing reservations often live in a community of non-Indians, particular since much reservation land was long ago sold out of Indian ownership in order to encourage interaction among the races. See, *e.g.*, *Mattz v. Arnett*, 412 U.S. 481, 496. Because of the unique history of Oklahoma, there are presently few, if any, of the type of Indian reservations found in other states (see *Morton v. Ruiz*, 415 U.S. 199, 212, 218-219); nevertheless, tribal Indians in that area are accorded the preferential treatment given reservation Indians elsewhere.<sup>34</sup>

Nor can the district court's conclusions be supported on the ground that the distribution statute does not correspond precisely to the current membership criteria of the Cherokee or Absentee Delaware tribes. For example, as the Kansas "Delawares" (Motion to Dismiss 4, No. 75-1301) and the court below (J.S. App. 48a, n. 40) have observed, membership in the Absentee Delaware Tribe is limited to persons of one-eighth Delaware blood, whereas Section 1292(c) (2)

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<sup>34</sup> See Hearings on H.R. 5200 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. 81-82 (March 13, 1972) (hereinafter referred to as "Hearings").

contains no such condition upon the receipt of tribal funds. Similarly, Indians whose name, or name of whose lineal ancestors, is on (or, in the case of the Absentee Delawares, is eligible to be on) certain designated tribal rolls are entitled to share in the distribution even though they may have withdrawn from the tribe. This, however, scarcely demonstrates any irrationality in the method Congress has chosen to distribute the Delaware tribal funds.

The contention that some recipients of judgment funds may no longer be tribal members ignores the settled power of Congress to specify which persons bearing a reasonable relationship to the tribe may be treated as tribal members for purposes of the allocation of tribal property in a beneficial manner. *Size-more v. Brady, supra*, 235 U.S. at 447; *Stephens v. Cherokee Nation, supra*, 174 U.S. at 488; Cohen, *Handbook of Federal Indian Law, supra*, at 98-99. Certainly, those Indians who are able to satisfy the statutory requisites will bear a sufficiently close relationship to the Delaware tribe for their inclusion to be proper.

More important, the fact that Congress may have adopted a bright-line standard that in isolated cases is over-inclusive in terms of the statutory objective is hardly significant so far as the Constitution is concerned. Even if one were to assume that some non-tribal Indians may be eligible to share in the distribution, a statute does not offend the Constitution simply because its classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*,

220 U.S. 61, 78. See *Massachusetts Board of Retirement v. Murgia*, No. 74-1044, decided June 25, 1976, slip op. 9; *Flemming v. Nestor*, *supra*, 363 U.S. at 612. As with most statutory classifications, imperfections in individual cases will occur, but it is not impermissible to conclude that the amount of the individual monetary awards authorized by the distribution statute would be substantially outweighed in administrative costs and delay by a requirement of case-by-case inquiry instead of substantial reliance on previously-compiled tribal rolls. *Weinberger v. Salfi*, *supra*, 422 U.S. at 777; *Mathews v. Lucas*, *supra*, slip op. at 14. Regardless of the inevitable imprecision, the statute furthers a legitimate legislative objective in a rational manner; the Due Process Clause requires no more.

The only other basis for the district court's contrary conclusion stems from its consideration of the legislative history of 25 U.S.C. (Supp. IV) 1291-1297, especially the absence of discussion about the Kansas "Delawares," which the court used not as an aid in the proper construction of the statute but as proof of its unconstitutionality. The district court stated that it was "persuaded that it was not the intent of Congress to exclude a group such as the Kansas Delawares from the distribution" (406 F.Supp. 1309).

It is scarcely clear what the court means by "intent of Congress" in this context; still less is it apparent why this has any significance to the constitutional issue presented here. There can be no doubt that the distribution statute will not permit the

Kansas "Delawares" to share in the award and that Congress intended only those specified in the legislation to receive the funds. Indeed, that the statute will have this effect is the precise reason why appellees brought suit. But we perceive no reason why it should make a constitutional difference if the legislative history contained statements by Members of Congress (or others) indicating that they knew the statute would not allow the Kansas "Delawares" to participate. The Due Process Clause cannot mean that legislation is unconstitutional unless the Senators and Representatives voting for it say that they are aware of all its possible ramifications—or perhaps more to the point, that they know not only who will benefit but also who will not.

Courts do not sit as law revision commissions deciding whether an Act of Congress may have expressed inartfully the true legislative intent or whether a different statute would have been enacted if all relevant factors had been brought to the attention of Congress. The task of the judiciary is to compare the text of a statute as enacted with the dictates of the Constitution and to determine whether they square. Moreover, the district court's approach is inconsistent with the rule that, under the "reasonable basis" test of equal protection, "a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6. See *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 732; *Dandridge v. Williams*, 397 U.S. 471, 485; *McGowan v. Maryland*, 366 U.S.

420, 426; Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1078 (1969).

Although we therefore disagree with the approach taken by the court below, we submit that even if the legislative history of a statute could induce a constitutional deficiency into a facially-valid law, nothing in the history of Sections 1291-1297 mandates that result. The Kansas "Delawares" are not mentioned in the congressional hearings or debates, but this silence—which is wholly attributable to the failure of that group to present itself during the legislative process or, indeed, at any time prior to the institution of this litigation<sup>35</sup>—is hardly dispositive. The legislative history does not support the conclusion that exclusion of the Kansas "Delawares" from the distribution is inconsistent with Congress' desire to make an equitable allocation of the Indian Claims Commission judgment.

Congress knew full well that some Indians who may be descended from members of the Delaware Tribe in 1856 and 1857 would not be allowed to share in the distribution authorized by 25 U.S.C. (Supp. IV) 1291-1297. H.R. 5200, the bill originally introduced to distribute the judgment funds, would have revised the payment rolls previously adopted in 25

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<sup>35</sup> See, e.g., Hearings on H.R. 5200 and H.R. 14267 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. 4 (May 8, 1972); Hearings on H.R. 14267 and H.R. 5200 before the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. 5 (May 10, 1972).

U.S.C. 1181-1186, relating to the violation of the 1818 Treaty, "to include the names of all persons born on or prior to and living on the date of this Act who are lineal descendants of members of the Delaware Tribe as it existed in 1854 \* \* \*." After legislative hearings, however, Congress rejected this "catchall" proposal and substituted the recommendation of the Cherokee and Absentee Delawares that participation be limited to persons who could trace their Delaware ancestry to tribal members on the 1906 and 1940 rolls specified in Section 1181(b) and (c).

To be sure, the attention of Congress was directed almost exclusively to the problems raised by the Munsee Indians, a band related to the Delawares, who had attempted to share in the earlier distribution statute, rather than to the Kansas "Delawares" (see J.S. App. 31a-32a), and it is safe to assume that Congress did not know the identity of every group of individuals who might be excluded as a result of its adoption of Sections 1291-1297 without a "catchall" provision.<sup>36</sup> Nonetheless Congress decided

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<sup>36</sup> The Senate Committee had earlier noted, in the course of its consideration of the proper distribution of the judgment relating to the 1818 Treaty, that "[t]here are also other individuals who are lineal descendants of members of the Delaware Nation as it was constituted in 1818, but who are not presently affiliated with either of the Oklahoma Delaware groups. Some, we believe, are affiliated with the Stockbridge-Munsee Indian community in Wisconsin, and others are not affiliated with any tribal group under Federal supervision." S. Rep. No. 1518, 90th Cong., 2d Sess. 4 (1968) (emphasis added). Thus, Congress was on notice that per-

not to distribute the judgment fund solely on the basis of an applicant's ability to trace his descendancy to a member of the Delaware tribe as it existed in 1856 and 1857.<sup>37</sup>

Furthermore, the legislative history reveals the acute concern of Congress that the method of distribution adopted in 25 U.S.C. 1181-1186 had occasioned an inordinate delay in the receipt of funds by eligible Indians. See Hearings 12, 22, 59, 79-80, 97, 105-106, 113. The experience under that statute indicated that the Bureau of Indian Affairs had encouraged participation by a large number of Munsees and had twice re-opened the eligibility proceedings so that they could submit applications. More than 1,500 Munsees eventually applied for a share of the fund and many of these claims were still pending in 1972 (Hearings 95-96). During its consideration of the 1854 Treaty judgment fund, Congress had been expressly advised that "[r]eference to a tribal entity of a given date is an invitation to a repetition of the problems that the Delawares experienced with the B.I.A. in [the distribution under Sections 1181-1186]" (see Letter to Chairman Wayne N. Aspinall, House Committee on Interior and Insular Affairs,

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sons other than the Munsees would be eliminated from distribution of the judgment relating to the 1854 Treaty by the removal of the "catchall" clause.

<sup>37</sup> See, *e.g.*, Hearings 133, 138. See also Hearings on S. 1067 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. 38-39 (July 21, 1972).

from Bruce Miller Townsend, November 16, 1971, p. 3, included in Hearings 9; see also Hearings 88-93).

The considerable hardship caused by the delay undoubtedly was a significant factor in the ultimate congressional decision to allocate the funds relating to the 1854 Treaty solely to the two existing federally-recognized tribes and to their members. This concern by Congress that undue delay and administrative difficulty not result from the distribution, while expressed solely in the context of the Munsees, likewise justifies exclusion of the Kansas "Delawares" regardless whether participation by that group was a subject of legislative debate.<sup>38</sup>

Finally, as evidenced by the provision of Section 1294(a) and (b) requiring ten percent of the distribution to be placed to the credit of the tribe for purposes approved by the Secretary, the legislative his-

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<sup>38</sup> See, *e.g.*, the following exchange between Robert Bruce of the Bureau of Indian Affairs and Rep. Edmonson (Hearings 138-139):

Mr. Robert Bruce. \* \* \* [W]e want those Munsees or Delawares who can prove their descendancy from the time of the treaties and the wrong at the time of the treaties—they should be given the opportunity to share in any award, the \* \* \* opportunity to prove that they were there, and that they are lineal descendants. Then we believe from our research that there are a few of these people. \* \* \*

Mr. Edmondson. I have a feeling that the language that you proposed that would exclude only those persons whose Delaware ancestry is derived solely from a person who [severed] his affiliation with the Delaware Nation prior to 1854 is going to present some real administrative problems.

tory suggests that Congress was sympathetic to the request that a portion of the judgment fund be devoted to beneficial tribal uses (see, *e.g.*, Hearings 39) —a still further indication that the resulting exclusion of nontribal Indians such as the Kansas “Delawares” was not, in this sense, unintentional.

We do not contend by the above discussion that the record reflects a deliberate and specific decision aimed at prohibiting the Kansas “Delawares” from participating in the appropriation redressing the government’s breach of the 1854 Treaty. What is clear, however, is that any relief from what the district court believed to be a mere legislative oversight must come from Congress and not the courts. The distribution authorized by 25 U.S.C. (Supp. IV) 1291-1297 has not yet occurred and, Congress has the power to alter its initial allotment plan (*United States v. Jim*, *supra*, 409 U.S. at 82-83). It is to that body that the claims of the Kansas “Delawares” should appropriately be addressed. Although the thrust of the Kansas “Delawares” legal assertions is that Congress could and should have included them in the distribution, they have failed to demonstrate why Congress’ contrary determination, in an area marked by such wide legislative discretion, is unconstitutional.

# CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

ROBERT H. BORK,  
*Solicitor General.*

PETER R. TAFT,  
*Assistant Attorney General.*

A. RAYMOND RANDOLPH, JR.,  
*Deputy Solicitor General.*

KENNETH S. GELLER,  
*Assistant to the Solicitor General.*

EDMUND B. CLARK,  
EDWARD J. SHAWAKER,  
*Attorneys.*

AUGUST 1976.